Supreme Court U.S.
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In the United States Supreme Court

WILLIAM COHEN,
Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA
Defendant-Appellee

Docket No. _____
October 1998 Term

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit
11th Circuit Docket No. 97-8737

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a statutory right of action for negligence based on a federal enactment–18 USC 4042– recognized in *United States v Muniz*, 374 US 150; 83 S Ct 1850; 10 L Ed 2d 805 (1963) on behalf of a federal prisoner assaulted by another prisoner improperly classified to the same correctional institution and security level is negated–thus leaving federal prisoners with no legally enforceable right of protection by the Bureau of Prisons against bodily harm while in federal custody other than that found in the Eighth Amendment prohibition against cruel and unusual punishment–by the discretionary function exception to the Federal Tort Claims Act, despite decisions in other circuits, *Brown v United States*, 486 F2d 284, 288 (CA 8, 1973); *Jones v United States*, 91 F3d 623 (CA 3, 1996); *Payton v United States*, 679 F2d 475, 482 (CA 5, 1982)(*en banc*), and *Flechsig v United States*, 991 F2d 300, 303-304 (CA 6, 1993) rejecting that notion and contradicting the Eleventh Circuit's decision, and notwithstanding the principle established in *FDIC v Meyer*, 510 US 471, 114 S Ct 996, 127 L Ed 2d 308 (1994), that the discretionary function exception has no application to rights based on federal law?

2. Whether Plaintiff is entitled to recover damages, without regard to the FTCA, based on a theory of constitutional tort, where plaintiff's pleadings were filed *in propria persona* and therefore, however "inartfully pleaded," are entitled to be broadly construed, *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976); *Haines v Kerner*, 404 US 519, 520-521; 92 S Ct 594; 30 L Ed 2d 652, so as to embrace not only an FTCA theory but a constitutional tort theory, establishing an alternate and independent basis for affirming the judgment of the District Court pursuant to *Owens v Haas*, 601 F2d 1242, 1249 (CA 2, 1979), cert den 444 US 980; 100 S Ct 483; 62 L Ed 2d 407, and *Carlson v Green*, 446 US 14, 19; 100 S Ct 1468; 64 L Ed 2d 15 (1980)?

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List of All Parties in the Eleventh Circuit

William Cohen, Plaintiff
Neal G. Gale, plaintiff's trial counsel (based on a contingency fee claim)

United States of America, Defendant

THERE ARE NO PARENT COMPANIES OR NON-WHOLLY OWNED SUBSIDIARIES TO BE DISCLOSED PURSUANT TO RULE 29.6; THERE ARE NO CORPORATIONS INVOLVED IN THIS MATTER .

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Citations of the Official and Unofficial Reports of the Opinions and Orders Entered in This Case by Lower Courts

Cohen v United States, 151 F3d 1338, 12 Fla L Weekly F C3 (CA 11, 1998)

THERE IS NO OFFICIAL OR UNOFFICIAL CITATION FOR THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION.

[Copies of the District Court's Findings of Fact, Judgment, and Interlocutory Decisions on pertinent motions are found in Appendices 1-4]

Jurisdictional Statement

William Cohen, *in propria persona* as well as *inops consilii*, after his administrative claim (timely filed on January 12, 1994) was rejected, filed this lawsuit in the United States District Court, Southern District of Georgia (Brunswick Division) on December 29, 1994[1]. The administrative claim was presented pursuant to 28 USC §2672[2] and the jurisdiction of the District Court was invoked under 28 USC §1346(b)(1), which grants the district courts exclusive jurisdiction of civil actions on claims against the United States for money damages or personal injury caused by the omission, negligence, or wrongful act of any employee of the federal Government while acting within the scope of office or employment.

After trial to the bench, during which Cohen was represented by counsel, judgment was entered by the United States District Court, Southern District of Georgia (Brunswick Division) on May 16, 1997. The United States had 60 days from that date, or until July 15, 1997, in which to file its notice of appeal. FRAP 4(a)(1). The United States Court of Appeals for the Eleventh Circuit's jurisdiction over the government's appeal was accordingly vested by the timely filing of a Notice of Appeal on July 11, 1997.

Jurisdiction of the Eleventh Circuit over the cross-appeal was vested by virtue of the filing, again *pro se*, of Plaintiff William Cohen's Notice of Appeal on July 23, 1997 (by Federal Express overnight service, FRAP 25(a) and 11th Cir. IOP 25.1), less than 14 days after the filing of the original Notice of Appeal by the United States on July 11, 1997. FRAP 4(a)(3). Thereafter, present counsel appeared for Cohen and briefed and argued the case before the Eleventh Circuit.

The Eleventh Circuit reversed the judgment of the District Court, holding that the discretionary function exception to the Federal Tort Claims Act insulates the Government from liability, thus not reaching issues raised

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[1] In its District Court pleadings, the Government acknowledged that service of process was made on the Attorney General on January 9, 1995, and on the United States Attorney on January 19, 1995.

[2] Mr. Cohen, suing for injuries sustained while incarcerated under the jurisdiction of the Attorney General (Bureau of Prisons), by virtue of having been liberated prior to filing the lawsuit, was not additionally subject to the requirement of 42 USC §1997e(a) to exhaust administrative remedies, although the filing of his administrative claim nonetheless had the effect of satisfying that statutory requirement if applicable.

in Cohen's cross-appeal, by opinion released August 26, 1998. *Cohen v United States*, 151 F3d 1338; 12 Fla L Weekly Fed C 3 (CA 11, 1998). Cohen timely moved for rehearing, FRAP 40(a), and 11th Cir.R. 40-2, and rehearing en banc (by virtue of 11th Cir. R. 35-6, a suggestion of rehearing en banc is automatically "treated as a petition for rehearing before the original panel"), but rehearing was denied by order of November 20, 1998.

This petition for certiorari is accordingly timely if filed on or before February 18, 1999 (90 days after November 20, 1998). Supreme Court Rule 13.1 and 13.3. The jurisdiction of the Supreme Court is invoked on the authority of 28 USC §1254(1).

Full Text of Constitutional Provisions and Statutes Involved in the Present Case

Constitutional Provisions:

U. S. Constitution, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes:
(in numerical order by Title and Section)

18 USC §3521:

> (a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.
>
> (2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of

the authority of the Attorney General contained in paragraph (1) would be appropriate.
(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

18 USC §3621(b):

(a) The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;
(2) the nature and circumstances of the offense;
(3) the history and characteristics of the prisoner;
(4) any statement by the court that imposed the sentence—
    (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
    (B) recommending a type of penal or correctional facility as appropriate; and
(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 USC §4041:

The Bureau of Prisons shall be in charge of a director appointed by and serving directly under the Attorney General at a salary of $10,000 a year. The Attorney General may appoint such additional officers and employees as he deems necessary.

18 USC §4042(2):

The Bureau of Prisons, under the direction of the Attorney General, shall—

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise; (3) . . .

18 USC §4081:

The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

28 USC §501:

The Department of Justice is an executive department of the United States at the seat of Government.

28 USC §503:

The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.

28 USC §1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 USC §1346(b)(1):

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and

the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC §2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 USC §2672:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the

Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee. Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned

out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 USC §2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee

of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 USC §2679(a):

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

28 USC §2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

42 USC §1997e(a):

(a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative

remedies as are available are exhausted.

Kansas Stat. Ann. 75-6104(e):

> A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:
>
> . . .
>
> (e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved; . . .

STATEMENT OF THE CASE

Nature of the Case Generally

William Cohen's *pro* se complaint in the United States District Court for the Southern District of Georgia, Brunswick Division, was in terms predicated on, and invoked the jurisdiction of the District Court pursuant to, the Federal Tort Claims Act, 28 USC §1346(b)(1) and §§2671 *et seq.*, based upon negligence and involving personal injuries., and also sounded directly under the Constitution. On February 8, 1992, William Cohen, a federal prisoner serving the final days of an 18 month sentence for copyright violations, was severely injured when attacked by another inmate incarcerated in the same part of the Jesup Federal Correctional Institution ("Jesup FCI"), the Community Corrections Center ("CCC"), a portion of the FCI carrying the lowest security classification within the federal correctional system, security [or custody] level "one out". Cohen's theory of liability was that the Federal Bureau of Prisons ("BOP") was negligent, and violated its statutory obligation under 18 USC §4042 to protect him (or correlatively his statutory right to be protected) during his incarceration.

Cohen asserted in his complaint, and proved at trial, that the government was negligent in assigning the perpetrator of the assault, Humberto Garcia, who had a long history of violence *inter alia*, to an FCI rated to house prisoners classified at "security level one out" ("SL-1 Out"). The government initially sought summary judgment under FRCivP 56 for lack of proof of negligence, but in the face of the overwhelming evidence of negligence at trial practically abandoned any pretense of having acted with due care (although keeping up appearances with *pro forma* argument to the contrary), and rested mainly on its contention that the all aspects of the prisoner classification process are within the FTCA's "discretionary function" exception, 28 USC §2680(a).

Two motions for dismissal, FRCivP 12, based on the discretionary function exception or some variation on the theme, were rejected by the trial judge, and the factual underpinnings of the defense were again found wanting after trial to the bench. The government was found liable by the trial judge as trier of fact, with no comparative negligence on the part of Mr. Cohen. Mr. Cohen was awarded $250,000 for pain and suffering. In its written findings, the

trial court pinned its monetary award on the physical pain and suffering, making no award for medical care and expenses or loss of consortium. The trial court also refused to award any economic damages for loss of past and future income to Mr. Cohen, a 62 year old in excellent health prior to the injury, and with a life expectancy, as found by the trial court, of 17 years, most or all of which, based on family history, might have been spent in gainful employment but for his injuries. Those damages issues were the subject of the cross-appeal by plaintiff Cohen, which were never adjudicated by the Eleventh Circuit.

Summary of Proofs and Findings

Following his conviction for copyright act violations, William Cohen, a 60 year old businessman from Flint, Michigan, was sentenced to 18 months incarceration by the Federal District Court for the Eastern District of Michigan, which sentence he began serving in February, 1991 following affirmance of his conviction by the Sixth Circuit[1] (in a 2-1 decision). Based on Mr. Cohen's lack of any prior criminal record, his age, his slight physical stature, the nature of his crime, and the length of his sentence, Mr. Cohen was assigned by the Attorney General to the Community Corrections Center ("CCC"), a facility within the larger Jesup Federal Correctional Institution. The CCC at Jesup FCI is a "Community custody level one out" institution, the lowest classification for security purposes within the federal correctional system, designed for the offenders presenting the least threat to the public and to one another.

The CCC at Jesup is a housing unit, consisting of two dormitories with a combined capacity for 500 prisoners quartered in cubicles not wholly dissimilar from some modern office arrangements (of the type often seen in the Dilbert© comic strip)[2], and featuring cafeteria style dining. These twin dormitories are managed and supervised by only two personnel working for the

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[1] *United States v Cohen*, 946 F2d 430 (CA 6, 1991).

[2] 37' X 10', bunk bed, wardrobe, desk, an opening with no door, a cork board for photos and notes.

Bureau of Prisons[3], reflecting the minimal oversight that "Community custody level one out" prisoners require. Prisoners are generally released during the day for work assignments within other units of Jesup or in nearby municipalities. During free time, prisoners may watch television in the community activities rooms provided for that purpose.

During Mr. Cohen's incarceration at Jesup, Humberto Garcia, a resident alien[4] originally from Cuba, was also assigned to the CCC to serve a 5 to 40 year sentence[5] for possession with intent to distribute more than 500 grams of cocaine (21 USC §841(a); 18 USC §2)—the actual amount exceeded 3 kilograms with 92% purity, equivalent to 2776 grams of 100% pure cocaine (6+ pounds)[6]. Before Garcia eventually pled guilty to that offense, the US Attorney for the Southern District of Florida sought to revoke Garcia's bond on an emergency basis for having threatened the government's confidential informant[7].

Mr. Garcia had a long criminal record beginning at age 18, with convictions for carrying a concealed firearm (2 counts), possession of cocaine, and resisting arrest, and numerous arrests for violent offenses including attempted murder, aggravated assault

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[3]So stipulated by the Government prior to trial.

[4]At trial, there was some dispute over Mr. Garcia's citizenship status. One unverified document indicated Garcia may have acquired U.S. citizenship when his mother was naturalized, but the Presentence Report (Appendix 9, p. 11, ¶#40)—the only document the accuracy of which was a product of a formal judicial hearing process in which Garcia actually had both motive and opportunity to correct any errors at sentencing, *United States v Kelly*, 687 F2d 1217, 1220 (CA 8, 1982) (yet the Presentence Report (Appendix 9, p. 17, Addendum), shows that Garcia, through counsel, objected only to a historical detail as to how he purchased his private motor vehicle)—not only asserted flatly that Garcia is an alien, but listed his INS alien registration number (A11643153).

[5]So indicated on all the sentencing records and by stipulation, but at trial it was claimed that such indeterminate sentences are no longer meted out under the federal sentencing guidelines, and that Garcia was actually sentenced to 63 months.

[6]Presentence Report (Appendix 9, pp. 2, ¶ #1).

[7]Presentence Report (Appendix 9, pp. 3-4, ¶#6).

(multiple occasions), and aggravated assault on a police officer, as well as burglary, carrying a concealed weapon, dealing in stolen property, obstruction of justice, obstruction by false information, possession of a machine gun, grand larceny, possession of a firearm with altered serial number, possession of cocaine, possession of qualuudes, possession of marijuana, and possession of narcotic equipment, and several for resisting arrest[8]. The presentence report on Garcia indicated he had assaulted one of his sisters (for which she filed no charges) shortly before his arrest on the cocaine charge[9]. Immediately after being arrested for the firearm violation, in the presence of the arresting officer, Garcia threatened to kill one of the witnesses by hiring a Colombian assassin[10]. Garcia, at the time of his assignment to Jesup FCI, was a relatively "virile" (in the words of the District Court's Judge [Appendix 1, p. 3, Finding #15]) young man (D.O.B. October 2, 1958) of solid physique, reflecting his training as a weightlifter. He dropped out of high school during the 10th grade, at which time he had a "D" scholastic average[11]. His record of violence was, according to the findings of the District Court, ignored by the BOP, in violation of the administrative prisoner classification guidelines (Appendix 1, p. 6, Findings ##32-33), in classifying him to Community custody level one out status. (Appendix 1, p. 5, Findings ##25-29). The District Court further found, expressly, that "Garcia's record demonstrates that he was a violent person . . ." (Appendix 1, p. 5, Finding #27) who, had the BOP followed its own guidelines, would have been assigned to a higher security level institution. (Appendix 1, p. 6, Finding #32).

On February 8, 1992, just four months before Mr. Cohen was scheduled to be released, while some prisoners were watching television, Garcia switched the channel. Mr. Cohen noted that the rules of the institution required a certain channel to be selected during that time frame, and returned the channel selector to that

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[8]Presentence Report (Appendix 9, pp. 6-10, ¶¶##19-38).

[9]Presentence Report (Appendix 9, p. 11, ¶#41).

[10]Presentence Report (Appendix 9, pp. 6-7, ¶#20).

[11]Presentence Report (Appendix 9, p. 12, ¶#45.

position. Nothing was said further by Mr. Garcia. (Appendix 1, p. 2, Findings ##5-7). The other prisoners one by one drifted out of the room and back to their cubicles. (Appendix 1, p. 2, Finding #8). Without warning, Garcia picked up a metal folding chair and attacked Mr. Cohen from behind, smashing him over the head repeatedly. (Mr. Cohen has no recollection of the attack; Mr. Garcia not surprisingly denied responsibility. However, the circumstantial evidence was so overwhelming[12] that, by the time of trial, the government effectively conceded the manner in which Mr. Cohen came to be so grievously injured)[13]. (Appendix 1, Finding #9).

Mr. Cohen was found alone, lying on the floor of the community activities room, unconscious and bleeding. (Appendix 1, Finding #10). After being rushed to a hospital, Mr. Cohen underwent neurological surgery to reduce a subdural hematoma, which was secondary to a basilar skull fracture bilaterally. (Appendix 1, Findings ##12-13). Surgery was followed by three weeks of hospitalization (Appendix 1, Finding #13) and then weeks of physical therapy and recuperation. Although Mr. Cohen has regained imperfect ambulation and most of his former intellectual function and long term memory, he suffers from permanent short term memory problems and has completely lost his sense of taste and smell. Mr. Cohen cannot mentally concentrate, suffers from vertigo and severe headaches, and is totally and permanently disabled. (Appendix 1, Finding #14).

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[12]Neither the Tooth Fairy nor the Easter Bunny came forward to acknowledge culpability in the assault, and it seemed improbable that Mr. Cohen had beaten himself over the back of the head with a chair, so the district judge had no trouble deducing that Garcia, the only other person known to be present, must be the perpetrator. The Bureau of Prisons, however, discreditably more intent on covering its administrative posterior and protecting the careers of civil servants than in sanctioning Mr. Garcia for his thuggery, could not bring itself to charge Mr. Garcia either criminally with assault with a deadly weapon or administratively with misconduct, asserting "lack of evidence." Like most attempted government coverups, this one was, at least until the Eleventh Circuit's decision, inefficacious; the district court was certainly not fooled.

[13]The facts in this paragraph were the subject of pretrial admissions or a stipulation at the commencement of trial, with the inference that Garcia perpetrated the actual assault left formalistically to the trier of fact, who duly reached that conclusion. (Trial transcript pp. 7-16).

After the prerequisite filing of a timely administrative claim which was rejected in due course, Mr. Cohen, proceeding *in pro per*, filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 USC §§1346(b) and 2671 *et seq*. and the Constitution of the United States, asserting that the government was negligent in assigning a prisoner with Humberto Garcia's personal history to a "Community custody level one out" FCI, in violation of the BOP's statutory duty to both safekeep prisoners under its jurisdiction and to protect those prisoners during their incarceration. 18 USC §4042; *United States v Muniz*, 374 US 150, 164-165 n. 26, 83 S Ct 1850, 10 L Ed 2d 805 (1963). The government filed two motions for dismissal based on the "discretionary function exception" to liability under the FTCA, 28 USC §2680(a), each of which was denied[14].

Following a bench trial before Hon. Anthony Alaimo in the United States District Court for the Southern District of Georgia, Brunswick Division, the government was found to be negligent and Mr. Cohen was awarded $250,000 in non-economic damages (pain and suffering), but zero dollars in economic damages. Judge Alaimo specifically found that the civil servant who classified Mr. Garcia as "Community custody level one out" had no discretion of the type

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[14]One reason, among others developed *infra*, why the discretionary function exception is inapposite is that the cited statute obviously creates a mandatory protective obligation on the part of the Government, acting through the Attorney General and Bureau of Prisons, which duty is intended to be facilitated through the various Program Statements which establish in detail the prisoner classification process. The District Court found that these administrative norms were not followed in assigning Humberto Garcia to the CCC at Jesup FCI. Such violations of administrative regulations preclude a finding that the government's actions are sheltered by the discretionary function exception. *United States v Gaubert*, 499 US 315, 322, 111 S Ct 1267, 1276, 113 L Ed 2d 335 (1991); *Phillips v United States*, 956 F2d 1071, 1076 (CA 11, 1992); *Kennewick Irrigation Dist v United States*, 880 F2d 1018, 1026-1027 (CA 9, 1989); *US Fidelity & Guaranty Co v United States*, 837 F2d 116, 120 (CA 3, 1988), *cert den* 487 US 1235, 108 S Ct 2902, 101 L Ed 2d 935. Thus, when as to Humberto Garcia the designator failed to factor into the classification decision elements which the administrative regulations required be taken into account, and correlatively gave great or preclusive weight to elements to which the regulations assigned little or no weight, she stood the regulations on their head and, by violating them, removed the injurious effects of her misconduct from the protective ambit of the discretionary function cocoon, even assuming *arguendo* the classification process otherwise constitutes a discretionary function.

relevant to immunizing the government under the "discretionary function" exception of the FTCA, and further concluded that this bureaucrat had in any event failed to follow the requisite administrative protocols by classifying Mr. Garcia without proper attention to the relevant historical factors and without obtaining pertinent factual information concerning Mr. Garcia (or by ignoring the relevant information).

On direct appeal, however, the Eleventh Circuit reversed, asserting that the District Court's finding of fact as to the failure of the BOP to follow its own guidelines for classifying prisoners was clearly erroneous, and that the discretionary function exception applies. In so holding, the Eleventh Circuit rejected prior contrary decisions of the former Fifth Circuit and of other Circuits as well. The Eleventh Circuit declined to address in any way Cohen's alternative argument that the judgment of the District Court could and should be upheld on the basis of a direct constitutional claim (or the matter remanded to the District Court for any necessary further findings as to such issues) which is well within the scope of the pleadings.

ARGUMENT

1. A statutory right of action for negligence based on a federal enactment--18 USC §4042–which the United States Supreme Court recognized in *United States v Muniz*, 374 US 150; 83 S Ct 1850; 10 L Ed 2d 805 (1963) on behalf of a federal prisoner assaulted by another prisoner improperly classified to the same correctional institution and security level is NOT negated so as to leave federal prisoners with no legally enforceable right of protection by the Bureau of Prisons against bodily harm while in federal custody–by the discretionary function exception to the Federal Tort Claims Act, as correctly recognized by decisions in other circuits, *Brown v United States*, 486 F2d 284, 288 (CA 8, 1973); *Cline v Herman*, 601 F2d 374, 375-376 (CA 8, 1979); *Flechsig v United States*, 991 F2d 300, 303-304 (CA 6, 1993) contradicting the Eleventh Circuit decision, and, independently, in accordance with the principle established in *FDIC v Meyer*, 510 US 471, 114 S Ct 996, 127 L Ed 2d 308 (1994), that the discretionary function exception has no application to rights based on federal law.

A. The Eleventh Circuit's decision misapplies the discretionary function exception.

The Eleventh Circuit reasoned that "our conclusion in this [case] is mandated by our holding in *Ochran v United States*, 117 F3d 495 (CA 11, 1997)"–a case not cited by either party. *Ochran*, however, is inapposite–which explains why neither party relied upon it–but that decision actually lends support, by virtue of its distinguishing salient features, to plaintiff Cohen's position, *if correctly understood*.

In *Ochran*, suit was brought by a federal witness, who charged that an Assistant US Attorney failed to protect her from a suspected offender who threatened her life. The present *Cohen* Eleventh Circuit opined that the statute at issue in *Ochran* (18 USC §3521) is similar to 18 USC §4042, the principal statutory basis for Cohen's claim against the BOP. To the contrary, however, the statute on which the plaintiff in *Ochran* relied both *expressly* imposes only discretionary duties on the Attorney

General[15], *and* expressly precludes judicial recognition of any actionable duty[16].

In contrast, 18 USC §4042 uses mandatory, not permissive language ("shall", not "may"), and lacks any directory proviso akin to 18 USC §3521(a)(3)'s express declaration that the cause of action normally implied by the principles of *Cort v Ash*, 422 US 66, 78, 95 S Ct 2080, 45 L Ed 2d 26 (1975) not be recognized.

Indeed, not only was it error to rely on *Ochran*, but the Sixth Circuit has correctly recognized that, irrespective of the applicability of the FTCA, since 18 USC §4042 establishes a duty of protection running from the BOP to a prisoner in its custody, *United States v Muniz*, 374 US 150; 83 S Ct 1850; 10 L Ed 2d 805 (1963), the discretionary function exception is inapposite to a federal tort action, based on the principle established in *FDIC v Meyer*, 510 US 471, 114 S Ct 996, 127 L Ed 2d 308 (1994). The Sixth Circuit reasoned:

> "Thus, *Meyer* prescribed that, because Congress merely decreed in 28 USC §2679(a) that the FTCA will supply the sole remedy for state law tort claims against the United States generated by wrongs committed by such agencies, the FTCA does not preclude the assertion of tort lawsuits supported by substantive federal law against federal government instrumentalities which have been congressionally invested with the power to sue and be sued[17] in their own names."

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[15] *E.g.*, "The Attorney General *may* provide for the relocation and other protection of a witness . . ." 18 USC §3521(a)(1); ". . . the Attorney General shall take such action *as the Attorney General determines to be necessary* to protect the person . . . The Attorney General *may*, by regulation . . ." 18 USC §3521(b)(1); ". . . the Attorney General *may* provide temporary protection to such person . . ." 18 USC §3521(e); "The Attorney General *may* terminate the protection provided under this chapter . . ." 18 USC §3521(f).

[16] ("The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter."). 18 USC §3521(3).

[17] The Department of Justice, an executive department of the United States, 28 USC §501, headed by the Attorney General, 28 USC §503, who in turn is also the

Federal Express Corp v US Postal Service, 151 F3d 536 (1998).

In accord with this principle as applied in the context of the liability of a correctional institution for failure to safekeep prisoners by exercising reasonable care to protect them from assaults by other prisoners is the decision in *CJW by and through LW v State*, 253 Kan 1, 8-15; 853 P2d 4, 7-14 (1993). There, the Kansas Supreme Court rejected governmental reliance on the discretionary function exception to the Kansas Tort Claims Act, *identical in terms to the Federal Tort Claims Act's* discretionary function exception, Kansas Stat. Ann. §75-6104(e). The Kansas court reasoned identically, *viz.*, that where a duty is imposed by law,[18] there is no discretion to omit to fulfill that duty, and thus the discretionary function exception does not shield the government from liability in situations, where, by virtue of either prior specific threats or the offending prisoner's history of violence and predisposition thereto, the assault is foreseeable, all of which that court held to be a question of fact, not of law. Here, the District Court found as fact—in findings unchallenged by the Government on appeal—that the BOP failed to exercise due care in classifying

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administrative head of the BOP, 18 USC §4041, similarly, by virtue of its inherent function of both suing in the name of the United States and defending suits against the United States, the AG/DoJ/BOP has(have) the power to sue and be sued. As the Court correctly reasoned in *United States v Rock Island Centennial Bridge Comm'n*, 230 F Supp 654, 655 (SD Ill, ND, 1964):

> "I hold that the court has jurisdiction of the cause. If the enabling act adopted by Congress imposes restrictions upon the purposes for which bridge tolls may be charged, either one or two results must emanate from the fact that the act itself makes no express provision for enforcement of its provisions. Either the act is not subject to enforcement, or the Attorney General as chief counsel for the United States, has authority to file a suit in the name of the United States to enforce the statute. To me the first alternative is untenable. Congress had the power to legislate. There is no contention here that that power was lacking, and it is inconceivable to me that the exercise of that power could be flouted without any hope of redress."

[18] In that case, the duty was imposed by the common law, Restatement of Torts 2d §§319-320, which principles are equivalent to 28 USC §4042.

Humberto Garcia, and that this negligence proximately caused William Cohen's injuries and damages.

Yet the Eleventh Circuit opinion effectively nullifies 18 USC §4042, since a statutory right of prisoners to be safely kept is meaningless if there is no means of enforcement. To the contrary, when the Attorney General violates a statute, the AG (in the juridical *persona* of the BOP) is liable to suit unless some immunity *external* to the FTCA applies. *Federal Express Corp v US Postal Service, supra; Halperin v Kissinger*, 196 US App DC 285, 606 F2d 1192 (1979), affirmed in part, cert dismissed in part 452 US 713, 101 S Ct 3132, 69 L Ed 2d 367. Here, the Attorney General, according to the findings of the trier of fact, violated the duty imposed by 18 USC §4042 to safely keep prisoner Cohen. This violation of a *federal* statute is actionable under *FDIC v Meyer, supra*, without regard to the discretionary function exception, which applies only to rights based on *state* law.

Accordingly, the Eleventh Circuit opinion is in conflict with the Supreme Court's decision in *FDIC v Meyer, supra* and additionally creates an inter-circuit conflict with *Federal Express v US Postal Service, supra*.

B. **The Eleventh Circuit opinion misconstrues and misapplies 18 USC §3621 so as to negate 18 USC 4042.**

In deeming that 18 USC §4042 imposes no actionable duty, the Eleventh Circuit asserts that any duty of safekeeping of prisoners which might arise is vitiated by 18 USC §3621, which gives the BOP complete discretion to designate "any available penal or correctional facility that meets minimum standards of health and habitability" as the place of a prisoner's imprisonment. Respectfully, this reading of two statutes which are clearly *in pari materia* is untenable. As the Sixth Circuit said in *Federal Express v US Postal Service, supra*, "It would be strange if Congress had resolved to give with one hand and then take away with the other." *Accord: Brunette Machine Works v Kockum Indus*, 406 US 706, 710 n. 8; 92 S Ct 1936; 32 L Ed 2d 428 (1972). 18 USC §4042 establishes a duty of safekeeping, while 18 USC §3621 allows the use of any available correctional facility *consistent with the duty of safekeeping separately established. Things Remembered, Inc v Petrarca*, 516 US 124; 116 S Ct 494; 133 L Ed 2d 461 (1995)

quoting *Thermtron Products, Inc v Hermansdorfer*, 423 US 336, 345-346; 96 S Ct 584; 46 L Ed 2d 542 (1976).

18 USC §3621 principally addresses matters of geography, *Persico v Gunnell*, 560 F Supp 1128 (SD NY, 1983); federal prisoners thus cannot claim any right to be incarcerated near their homes and families. Construing 18 USC §3621 as negating the duty of safekeeping created by 18 USC §4042 violates cardinal rules of statutory construction. *Connecticut Nat Bank v Germain*, 503 US 249, 253; 112 S Ct 1146; 117 L Ed 2d 391 (1992); *United States v United Continental Tuna Corp*, 425 US 164, 168; 96 S Ct 1319; 47 L Ed 2d 653 (1976). The Eleventh Circuit opinion effectively holds that by virtue of 18 USC §3621 Congress took away the protections established in 18 USC §4042, which flouts still another principle of statutory construction. *Brunette Machine Works v Kockum Indus, supra*, 406 US at 710 n. 8. Note that Garcia could have been geographically assigned to the same location but at a different security level (FCI Jesup borders a walled federal correctional enclave featuring Security Levels 1-"IN" through 4), so there was no practical impediment to fulfilling both statutory mandates.

Moreover, the very existence of such statutory rights implies the existence of all necessary and appropriate remedies for their vindication. *Sullivan v Little Hunting Park, Inc*, 396 US 229, 239; 90 S Ct 229; 24 L Ed 2d 386 (1969); *Texas & Pac R Co v Rigsby*, 241 US 33, 39; 36 S Ct 482; 60 L Ed 874 (1916) ("A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied . . ."). It was on just this basis that *Muniz* recognized 18 USC §4042 as providing the basis for a federal cause of action. The Eleventh Circuit opinion has imported sovereign immunity back into a statute designed to limit it, *Indian Towing Co v United States*, 350 US 61, 69; 76 S Ct 122; 100 L Ed 61 (1955), and also purported to transmogrify the discretion accorded clerical personnel in classifying prisoners into the type of social, economic, or regulatory policy for which the discretionary function was intended and to which it is limited in application, *United States v Gaubert*, 499 US 315, 325 n. 7; 111 S Ct 1267; 113 L Ed 2d 335 (1991).

C. **The Eleventh Circuit opinion misunderstands *Calderon v United States*, 123 F3d 947 (CA 7, 1997).**

Calderon, which the Eleventh Circuit also found persuasive, is readily distinguishable from the present case. In *Calderon*, no claim was made that the offending prisoner should not have been classified or placed at the same institution with the plaintiff (Calderon); rather, the claim there was that the BOP neglected to protect Calderon from foreseeable attack by fellow inmate Perez. The Seventh Circuit not only found no statute mandating such protection, but an administrative *regulation*[19] expressly declaring that it would be up to BOP staff discretion whether and what steps, if any, to take in such situations.

In the present case, in contrast, there is a statute mandating that the BOP classify inmates appropriately, and no regulation suggesting discretion to be negligent in doing so–as repeatedly noted by both plaintiff Cohen and the United States, the Program Statement does not have the status of a duly adopted and promulgated regulation, but is merely a description of how the BOP conducts its internal operations[20]. Elevating the Program Statement to the level of a formal regulation which defeases plaintiff Cohen of his statutory right to be kept safely while in the custody of the BOP both exceeds any justification to be found in *Calderon* and is inconsistent with the principles of *Cort v Ash*, *Federal Express Corp v US Postal Service*, and *FDIC v Meyer*, *supra*.

D. The Eleventh Circuit opinion ignores cited precedent from other circuits and creates an inter-circuit split.

The Eleventh Circuit opinion completely ignores three cases duly cited by plaintiff Cohen and never distinguished or even addressed by the government, *Brown v United States*, 486 F2d

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[19] In contrast to the Program Statement, which has no such formal legal status.

[20] The Program Statement, so much the focus of attention by the Government and of decision by the Eleventh Circuit, is merely a description of the BOP's internal operating procedures, and has no legal status as a regulation. *Flechsig v United States*, *supra*, 991 F2d at 304. *A fortiori*, it can hardly insulate the Government from civil liability for breaching a statutory duty recognized by this Court in *Muniz*, *supra*.

284, 288 (CA 8, 1973), *Jones v United States*, 91 F3d 623, 624-625 (CA 3, 1996), and *Flechsig v United States*, 991 F2d 300, 303-304 (CA 6, 1993), as well as *Cline v Herman*, 601 F2d 374, 375-376 (CA 8, 1979). In *Brown* and *Cline*, the Eighth Circuit recognized the federal government is answerable in damages under the FTCA for the simple negligence of BOP personnel in failing to protect federal prisoners. In *Jones*, the Third Circuit recognized that 18 USC §4042 establishes an actionable duty of care which that Court deemed "unambiguous," while in *Flechsig* the Sixth Circuit recognized that 18 USC §4042 sets forth a legal duty on which a viable negligence action may be predicated (although holding that the prisoner in that case failed to come forward with any evidence of negligence). *Brown*, exactly like the case at bar, involved a claim that the BOP was negligent in assigning the offending prisoner to the same institution as the plaintiff prisoner; neither *Calderon* nor any other case relied upon by the Eleventh Circuit or the government involves such a theory of liability. The Eleventh Circuit opinion thus creates an inter-circuit split.

Highlighting this inter-Circuit split of authority, *Flechsig* was followed and applied in a factual context similar to that of the case at bar even *after* publication of the Eleventh's Circuit's present *Cohen* decision. *Jackson v United States*, 24 F Supp 2d 823, 830-831 (WD Tenn, 1998), the district court there rejecting application of the discretionary function exception to the actions of lower level BOP personnel. Thus, federal prisoners in the States comprising the Third, Fifth, Sixth, and Eighth Circuits are owed a duty of reasonable care by the BOP, but federal prisoners in the territory assigned to the Eleventh Circuit are unprotected except by the Eighth Amendment. Such an inter-circuit disparity in enforceable rights and protections under a single statute violates the equal protection component of the due process clause of the Fifth Amendment. *Bolling v Sharpe*, 347 US 497, 499, 74 S Ct 693, 98 L Ed 884 (1954).

E. The District Court's finding of fact–that the officials who classified and assigned Humberto Garcia to Jesup FCI did not exercise policy judgment–was never challenged by the government and was therefore binding on the Eleventh Circuit.

For the discretionary function exception to be invoked by the government, the officials who made a decision which is the subject of suit must have exercised policy judgment. Whether an official decision represents a policy judgment of the type protected by the discretionary function exception is a question of fact, *Berkovitz v United States*, 486 US 531, 545; 108 S Ct 1954; 100 L Ed 2d 531 (1988). The government on appeal never argued that the District Court's finding of fact, after trial, that BOP designators—the federal employees who actually classified Humberto Garcia to security level one-out status—did not exercise policy judgment, is clearly erroneous, and this unchallenged finding should have controlled the matter on appeal[21]. *Jackson v United States*, *supra*, 24 F Supp 2d at 831.

That no policy judgment was involved is also readily seen even if the issue were a matter of law. The Policy Statement is not an administrative regulation, but merely a statement of BOP internal operating procedure, and it does not have the force of law. *Flechsig v United States, supra*, 991 F2d at 304; *Chrysler Corp v Brown*, 441 US 281, 301; 99 S Ct 1705; 60 L Ed 2d 208 (1979); *Dorr v United States*, 195 US 138, 146; 24 S Ct 808; 49 L Ed 2d 128 (1904). The District Court properly determined that the BOP designators at most exercise discretion of the type found in driving an automobile on an officiál mission, as to which this Honorable Court has already expressed itself:

> "Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy."

United States v Gaubert, supra, 499 US at 325 n. 7.

2. Plaintiff is entitled to recover damages, without regard to the FTCA, based on a theory of constitutional tort.

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[21]The designator's testimony, which was that the only concerns within her bailiwick were "whether or not there was a judicial recommendation, if there was a detainer involved, the severity of the current offense, if there was violence, the length of sentence. Those are the policy issues I would consider," supports this finding.

A. Because Plaintiff's pleadings were filed *in propria persona* and never amended, they must be broadly construed to plead any cause of action cognizable on the facts.

Plaintiff has consistently maintained that his pleadings, which were filed *in propria persona* and which therefore, however "inartfully pleaded," are entitled to be broadly construed, *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976); *Haines v Kerner*, 404 US 519, 520-521; 92 S Ct 594; 30 L Ed 2d 652 (1972), embrace not only an FTCA theory but a constitutional tort theory. The duty which the District Court found the government negligently breached as to plaintiff Cohen is one owed, if not by virtue of statute, then directly under the Constitution. *Owens v Haas*, 601 F2d 1242, 1249 (CA 2, 1979), cert den 444 US 980; 100 S Ct 483; 62 L Ed 2d 407. The FTCA remedy is not exclusive for federal constitutional torts. *Carlson v Green*, 446 US 14, 19; 100 S Ct 1468; 64 L Ed 2d 15 (1980). Therefore, the judgment should have been affirmed on this alternate and independent ground (which was duly noted in plaintiff's brief to the Eleventh Circuit, pp. 19 and 26, and at oral argument, and never challenged by the government), or at least remanded to the district court for further findings. *Farmer v Brennan*, 511 US 825; 114 S Ct 1970; 128 L Ed 2d 811 (1994).

B. The Eleventh Circuit decision overlooks unchallenged evidence of violence in asserting that the District Court clearly erred in finding that the BOP failed to follow the Policy Statement.

The Eleventh Circuit opinion holds that the District Court clearly erred in its fact finding that the BOP failed to follow the Policy Statement in concluding that the designator omitted to enter a history of violence on the BOP-14. In so holding, the Eleventh Circuit ignored unchallenged evidence, in the Presentence Report, showing that Humberto Garcia, aside from his multiple convictions, had threatened to hire an assassin to kill a witness and had assaulted and battered his sister between the date of conviction and sentencing of his cocaine conviction. PS 5100.2, Sec. 9, p. 16, item #12, states:

> 12. History of Violence: . . . History of violence includes the individual's entire background of

> criminal violence, excluding current offense . . . defined according to the degree of the seriousness of the act which resulted in a conviction *or a finding of guilt.*

Garcia had full due process with respect to the accuracy of the information in his Presentence Report, so this information, although not relating to convictions, did reflect findings of guilt[22]. The District Court therefore had this additional record support for its factfindings, which are thus not clearly erroneous.

C. Plaintiff Cohen is in any event entitled to a remand on the issue of Humberto Garcia's citizenship status.

The Eleventh Circuit's opinion in this case of *Cohen v United States*, 151 F3d 1338 (CA 11, 1998) concludes with the assertion that Humberto Garcia's alienage was left indeterminate by the District Court, but that this omission is immaterial, on the theory that "the Program Statement provides that the BOP's regional director retains the discretion to assign an alien to the lowest security level." (Appendix 5, p. 13) That is not true.

The Program Statement provides that a deportable alien must be assigned no lower than Security Level 2, but may, with the approval of the Regional Director, be placed in SL-1. The Eleventh Circuit overlooked the key distinction between "SL-1" and "SL-1 Out". Garcia, notwithstanding his status as a deportable alien, could have been assigned to an SL-1 institution, but nothing in the Program Statement suggests the possibility of an "SL-1 Out" placement like FCI Jesup. Thus, Garcia could not have been placed in the same institution as William Cohen, and his improper assignment to FCI Jesup at "SL-1 Out" by the BOP was therefore both wrongful and a proximate cause of Cohen's injuries. Cohen, at a minimum, is entitled to a remand to the District Court for resolution of the factual issue of whether Garcia was an alien or a citizen.

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[22] As any person being sentenced, Garcia had both motive and opportunity to correct any errors in his Presentence Report during allocution, so the report should carry a presumption of accuracy as to such matters. *United States v Kelly*, *supra*.

CONCLUSION

Plaintiff-Appellant Cohen respectfully requests that this Honorable Court grant the petition for certiorari so as to resolve the important issues presented, specifically reserved for later decision in *United States v Muniz, supra*, on which there is a clear division of authority among the various circuits (with the decision in the case at bar representing a minority of one) and thereafter vacated the Eleventh Circuit's opinion while concomitantly reinstating the District Court's finding of liability (as against the principal appeal of the United States), and remand the cause to the Eleventh Circuit for adjudication of the cross-appeal previously filed by William Cohen.

Alternatively, Plaintiff prays that this Honorable Court exercise its error correcting power to peremptorily reverse the decision of the Eleventh Circuit on the basis of the principles established in *FDIC v Meyer, supra* as applied to Plaintiff's statutory cause of action as previously established in *Muniz, supra*.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Bureau of Prisons decisions regarding the designation of correctional institutions for federal prisoners are entrusted to the Bureau's discretion and within the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a).

2. Whether the court of appeals correctly held that the Bureau of Prisons, in filling out a Security Designation Form for a convicted offender, followed the guidelines in its Security Designation and Custody Classification Manual.

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Bureau of Prisons, *Security Designation and Custody Classification Manual*	2, 3, 4, 9, 14, 15, 16
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	8

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1340

WILLIAM COHEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5, at 1-14) is reported at 151 F.3d 1338. The opinion of the district court (Pet. App. 1, at 1-10) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6, at 1) was entered on August 26, 1998. A petition for rehearing was denied on November 20, 1998 (Pet. App. 7, at 1). The petition for a writ of certiorari was filed on February 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 18 U.S.C. 4042(a)(2), the Bureau of Prisons (Bureau) must "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." To assist the Bureau in achieving those goals, 18 U.S.C. 3621(b) declares that, after a defendant is sentenced, the Bureau "shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise * * * that the Bureau determines to be appropriate and suitable." The statute requires that, in making placement decisions, the Bureau consider facility resources; the nature and circumstances of the prisoner's offense; the history and characteristics of the prisoner; any statement by the court that imposed sentence; and any pertinent policy statement of the Sentencing Commission. 18 U.S.C. 3621(b).

During the time period relevant here, the Bureau carried out those statutory responsibilities through procedures set forth in Section 5100.02 of the Bureau's *Security Designation and Custody Classification Manual* (Manual). (Relevant provisions of the Manual are reproduced as an Appendix to this brief. App., *infra*, 1a-39a). The Manual directs the Bureau to obtain, after sentencing, copies of the pre-sentence report and the judgment of conviction. That information, as well as information taken from the Bureau's computer information system (SENTRY) is then used to complete a "Security Designation Form," Manual § 2, at 1 (App., *infra*, 4a); Manual § 5, at 1-2

(App., *infra*, 13a-14a), which requires various categories of information, including (among other things) the severity of the offense committed, the expected duration of incarceration, any prior commitments (*i.e.*, periods of time for which the individual was previously sentenced to confinement), any escapes or attempted escapes, the individual's history of violence, and his or her pre-commitment status. Manual § 9, at 12-18 (App., *infra*, 28a-36a). For each of those categories, the Manual provides a system for reducing qualitative information to a numerical score as well as a basic grade, typically "minor," "moderate," or "serious." The sum of the points received in each category is then used as an indicator of the level of security required for that prisoner. *Ibid.* The form also includes a line for a tentative recommended placement.

Completed Security Designation Forms are entered into the SENTRY computer system, and then forwarded to the Regional Designator, the individual charged with making the ultimate custody determination. The Regional Designator is required to consider not only the Security Designation Form and the initial placement recommendation, but also any other relevant factor, including any judicial recommendations concerning placement, the age of the offender, where the offender will live when released, questions of overcrowding and racial composition at particular institutions, the need for monitoring, whether the offender has a narcotics addiction, psychiatric evaluations, split sentences, whether the offender is an alien, the individual's medical needs, the results of any parole hearing, and whether there had been a voluntary surrender. Manual § 5, at 2 (App., *infra*, 14a-15a). For example, the Manual instructs that a sentencing court's

decision to permit an offender to surrender voluntarily ordinarily indicates that the offender should be placed in a Security Level 1 (*i.e.*, a minimum security or "camp appropriate") institution. Manual § 9, at 18 (App., *infra*, 35a).

The Manual also provides that the guiding principle of custody placement "is that every inmate should be in the lowest custody level deemed appropriate to adequately supervise that individual." Manual § 10, at 1 (App., *infra*, 37a). The Manual further states that "the intent of the Custody Classification system is to permit staff to use professional judgment within specific guidelines. Custody changes are not 'automatic' or 'mechanical' or dictated by a point total on a form." *Ibid.* Nonetheless, to the extent the Regional Designator declines to follow the recommendation on the Security Designation Form, he or she is required to document the reasons for, and inform the inmate of, that decision. *Id.* (App., *infra*, 37a-38a).

2. Petitioner was assigned to a minimum security facility in Jesup, Georgia, after his conviction for copyright infringement. On February 8, 1992, he was found injured and unconscious in the facility's television room. There were no eye witnesses to the assault. However, after an investigation, prison officials concluded that another prisoner, Humberto Garcia, had committed the assault. Garcia had no history of violence at the institution. He had been convicted of possession with intent to distribute cocaine, and his prior offenses included carrying a concealed weapon, non-violent resistance to arrest, possession of cocaine, loitering, and dealing in stolen property. Pet. App. 3, at 2.

Petitioner filed suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging that the Bureau of Prisons had negligently placed Garcia in a

minimum security prison, and hence had failed to protect petitioner from a foreseeable assault. More specifically, petitioner contended that Garcia's Security Designation Form had not been properly filled out. Had the form properly reflected Garcia's criminal history, petitioner alleged, Garcia would have been sent to a higher security facility instead of Jesup.

The district court denied the government's motion to dismiss, holding that the suit was not barred by the FTCA's discretionary function exception, 28 U.S.C. 2680(a). "[A]s a matter of law," the court held, "the Bureau of Prisons * * * owed a non-discretionary statutory duty of safekeeping, care, and protection of [petitioner]." Pet. App. 1, at 8. In this case, the district court continued, the Bureau had breached that duty. In particular, the court concluded that the Bureau had departed from the requirements of its own Manual by failing to disclose Garcia's prior felony convictions on Garcia's Security Designation Form. If those "convictions had been entered, and Garcia's lengthy arrest record considered," the court held, "Garcia would have [been] assigned to a higher level security institution than the Jesup Camp facility." *Id.* at 9. After a bench trial, the court awarded petitioner $250,000 in compensatory damages. Pet. App. 2, at 1.

3. The court of appeals reversed. Pet. App. 5, at 14. The court ruled that, under both 18 U.S.C. 4081 and 3621, the Bureau of Prisons is given discretion over the placement of prisoners in penal institutions. "These statutory provisions," the court held, "do not mandate a specific, non-discretionary course of conduct for the [Bureau] to follow in classifying prisoners and placing them in a particular institution. Instead, they give the [Bureau] ample room for judgment." Pet. App. 5, at 9. The court further reasoned that the type of discretion

exercised by the Bureau in this context is "susceptible to policy analysis." *Id.* at 10-11. Accordingly, it held that, under cases such as *United States* v. *Gaubert*, 499 U.S. 315 (1991), the Bureau's actions in this case were within the discretionary function exception of the FTCA. Pet. App. 5, at 10-11.

The court also held that Bureau personnel in fact had followed the guidelines set forth in the Manual. While the district court had held that the Bureau's failure to include Garcia's prior felony convictions in either the Prior Commitment or History of Violence sections of Security Designation Form was error, the court of appeals concluded that the omissions were proper. In particular, because Garcia's two prior convictions "did not result in confinement, they were properly omitted from [the Prior Commitment] section. As for the History of Violence section, nothing in the Program Statement requires including in that section convictions of possession and sale of cocaine, possession of a firearm, or resisting arrest without violence." Pet. App. 5, at 13. Accordingly, the court dismissed the complaint for want of subject matter jurisdiction. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. The United States may not be sued unless Congress by statute expressly and unequivocally waives the United States' immunity to suit. See *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). The Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, provides a waiver of immunity for certain tort suits, but excludes various categories of claims from the scope of the

waiver. One of those exclusions is for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). That exclusion has come to be known as the "'discretionary function' exception." See *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991).

This Court has held that a challenged decision or action falls within the discretionary function exception if, and only if, it meets two requirements. First, the challenged decision must involve an element of choice. *Gaubert*, 499 U.S. at 322. Consequently, if the challenged decision or action violates a specific, mandatory provision of a federal statute, regulation or policy, and thus does not embody a permissible exercise of judgment, it does not fall within the discretionary function exception to the FTCA's waiver. *Ibid.*; *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). Second, the governmental decision at issue must implicate the exercise of judgment involving public policy considerations. *Gaubert*, 499 U.S. at 323. "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Id.* at 324.

In this case, the court of appeals correctly held that the discretionary function exception precludes petitioner's suit. In essence, petitioner claims that the Bureau placed petitioner's assailant, Humberto Garcia, in an inappropriate facility in light of his criminal history. Congress, however, gave the Bureau great discretion in assigning individuals to correctional facilities. By statute, the Bureau may "designate any available

penal or correctional facility * * * that the Bureau determines to be appropriate and suitable" for that prisoner. 18 U.S.C. 3621(b). The statute identifies certain factors the Bureau should take into account in making placement decisions,[1] but the listing of those factors does not eliminate the Bureau's discretion or preclude it from exercising policy-based judgments. To the contrary, as the Senate Report observes, "[t]he Committee, by listing factors for the Bureau to consider in determining the appropriateness or suitability of any available facility, does not intend to restrict or limit the Bureau in the exercise of its existing discretion so long as the facility meets the minimum standards of health and habitability of the Bureau, but intends simply to set forth the appropriate factors that the Bureau should consider in making the designations." S. Rep. No. 225, 98th Cong., 1st Sess. 142 (1983).

Courts have long recognized that the authority to classify and transfer federal prisoners falls within the Bureau's broad and nearly exclusive discretion. Thus, as the Second Circuit observed (in a different context), prisoner placement "decisions are within the sole discretion of the Bureau of Prisons." *United States* v. *Williams*, 65 F.3d 301, 307 (2d Cir. 1995). See also *United States* v. *Restrepo*, 999 F.2d 640, 645 (2d Cir.) ("[t]he Bureau is given a great deal of flexibility with respect to the assignment of any prisoner to a correctional facility"), cert. denied, 510 U.S. 954 (1993); *Jones* v.

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[1] The statute directs the Bureau to consider the resources of the facility, the nature and circumstances of the offense, the history and characteristics of the prisoner, any statement of the sentencing court, any pertinent policy of the Sentencing Commission, and to show no favoritism to prisoners of higher social or economic status. 18 U.S.C. 3621(b).

United States, 534 F.2d 53, 54 (5th Cir.) ("prison officials must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status"), cert. denied, 429 U.S. 978 (1976); *Leibowitz* v. *United States Dep't of Justice*, 729 F. Supp. 556, 561 (E.D. Mich. 1989) ("[t]he Bureau of Prisons enjoys almost absolute discretion over assignment, transfer, and conditions of confinement"), aff'd, 914 F.2d 256 (6th Cir. 1990), cert. denied, 499 U.S. 963 (1991). Indeed, the Manual itself explains that "the intent of the Custody Classification system is to permit staff to use professional judgment within specific guidelines. Custody changes are not 'automatic' or 'mechanical' or dictated by a point total on a form." Manual § 10, at 1 (App., *infra*, 37a). The first requirement under *Gaubert* thus is easily met.

The second *Gaubert* requirement is also easily met, for it cannot be disputed that the Bureau's decisions in this context implicate public policy. See *Procunier* v. *Martinez*, 416 U.S. 396, 404-405 (1974) (noting that the problems of prisons, which are "complex and intractable" and "require expertise, comprehensive planning, and the commitment of resources," are best left to the executive and legislative branches); *Bell* v. *Wolfish*, 441 U.S. 520, 547-548 (1979) ("[p]rison administrators * * * should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security"). Indeed, prisoner placement decisions require prison administrators to balance numerous public policy factors, such as the risk of exposing a prisoner to more dangerous prisoners, the effect on and importance of efforts at rehabilitation, any impact on familial relations, and the costs of incarceration. As a result, the

court of appeals correctly held that the discretionary function exception applies here and barred petitioner's claim.[2]

2. Petitioner's assertion (Pet. 9-11) that the court of appeals' decision in this case conflicts with this Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), and the Sixth Circuit's decision in *Federal Express Corp.* v. *United States Postal Service*, 151 F.3d 536 (1998), is without merit. Those cases hold that, even where the FTCA does not waive immunity, a federal cause of action might be permitted to proceed against a federal agency or instrumentality *if* Congress has waived that entity's immunity to suit through a sue-and-be-sued clause. See *Meyer*, 510 U.S. at 480-483 (because claim "is not cognizable" under the FTCA, "we must determine whether FSLIC's sue-and-be-sued clause waives sovereign immunity for the claim"); *Federal Express*, 151 F.3d at 539 (FTCA does not preclude suits based on federal law against agency if statute provides that agency can "sue and be sued" in its own name, "because

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[2] Petitioner argues (Pet. 14-15) that the government waived any challenge to the district court's "finding" that the Bureau does not exercise policy judgment by failing to challenge it in the court of appeals. That case-specific contention does not warrant a grant of certiorari, and in any event is incorrect. The government raised the discretionary function exception on appeal, and with it the question whether Bureau decisions involve the sort of policy judgment to which that exception applies. Gov't C.A. Opening Br. 20-29; Gov't C.A. Reply Br. 11-25. In any event, the immunity of the United States cannot be altered through a lawyer's omissions; it can be waived only by an Act of Congress. See, *e.g.*, *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887); see also *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). As a result, even if the government had failed to raise an immunity issue, it would not be error for the court of appeals to address the issue.

Congress's inclusion of a 'sue or be sued' clause in an agency's authorizing legislation creates a *presumption* of abandonment of public immunity."). See generally *Franchise Tax Bd.* v. *United States Postal Serv.*, 467 U.S. 512, 520 (1984) (explaining that, by including a sue-and-be-sued clause in an instrumentality's authorizing legislation, Congress "launche[s] [the instrumentality] into the commercial world," making its amenability to suit and its "liability" largely "the same as that of any other business."). Because Congress has not waived the United States' or the Bureau's immunity through a sue-and-be-sued clause, petitioner's reliance on *Meyer* and *Federal Express* is misplaced.[3]

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[3] In a footnote (Pet. 9 n.17), petitioner attempts to equate "the inherent power" of the Attorney General to sue on behalf of and to defend suits against the United States with a sue-and-be-sued clause. That effort fails. Waivers of sovereign immunity must be unequivocally expressed in the text of a federal statute, and petitioner cites no statutory language waiving the government's immunity through a sue-and-be-sued clause or otherwise. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986);*United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). Moreover, the authority of the Attorney General to represent the United States in litigation—which is not "inherent" but rather is expressly granted by 28 U.S.C. 515-519—does not in any way suggest that the immunity of the United States has been waived. To the contrary, one of the defenses the Attorney General can raise when defending actions against the United States is sovereign immunity. See, *e.g.*, *Department of the Army* v. *Blue Fox*, 119 S. Ct. 687 (1999). In any event, petitioner cites nothing that even remotely suggests that Congress, by permitting the Attorney General to represent the interests of the United States in litigation, intended to "launch[]" the entire government "into the commercial world" for purposes of monetary liability, as it often does with respect to individual instrumentalities when it inserts a sue-and-be-sued clause into their authorizing legislation. *Franchise Tax Bd.*, 467 U.S. at 520.

Petitioner's claim (Pet. 13-14) that the court of appeals' decision conflicts with *Jones* v. *United States*, 91 F.3d 623 (3d Cir. 1996), *Flechsig* v. *United States*, 991 F.2d 300 (6th Cir. 1993), *Cline* v. *Herman*, 601 F.2d 374 (8th Cir. 1979), and *Brown* v. *United States*, 486 F.2d 284 (8th Cir. 1973), is similarly without basis. Neither *Jones*, *Flechsig*, nor *Cline* even mentions the discretionary function exception to the FTCA, and certainly none addresses whether it precludes suits based on improper prisoner placements. See Pet. App. 5, at 7 (distinguishing *Jones* on that basis). And *Brown*, far from supporting petitioner's view, expressly recognizes that, on remand, "plaintiff's cause of action under the Federal Tort Claims Act is confronted by a very serious obstacle in the form of the discretionary function exception." 486 F.2d at 289.

3. Petitioner also argues that the discretionary function exception does not apply here because the Bureau violated non-discretionary duties. See Pet. 9, 11, 13. The argument lacks merit.

a. Petitioner first appears to argue that, because 18 U.S.C. 4042 uses mandatory language—it states that the Bureau "shall * * * provide for the safekeeping, care and subsistence of" prisoners—the Bureau has a non-discretionary duty to ensure prisoner safety, and that such duty is breached any time a prisoner is injured. See Pet. 9, 11, 13; see *Gaubert*, 499 U.S. at 322 (to fall within discretionary function exception, challenged decision must be "discretionary" in nature, that is, "involv[e] an element of choice" or "embody a permissible exercise of judgment"). Section 4042 may provide a non-discretionary duty to "provide for" prisoner safety, *i.e.*, to make provisions for and to take precautions toward prisoner security, which the Bureau undeniably did. It does not, however, impose a duty to

guarantee prisoner safety through an error-proof system, as petitioner appears to contend. Nor does it eliminate the Bureau's discretion in determining how to go about making such provision. See Pet. App. 5, at 8 ("The Seventh Circuit reasoned persuasively that [w]hile it is true that [§ 4042] sets forth a mandatory duty * * *, it does not, however, direct the manner by which the [Bureau] must fulfill this duty.") (quoting *Calderon* v. *United States*, 123 F.3d 947, 950 (7th Cir. 1997) (internal quotation marks omitted)). And it is precisely the exercise of that discretion that petitioner challenges here. Petitioner does not contend that the Bureau made *no* provisions for his safety. Instead, he claims that the Bureau erred in deciding to place a particular prisoner in a minimum security prison. A claim that the government should have put greater restraints on an individual's liberty is not a promising candidate for exemption from the discretionary function exception. And, for the reasons explained above, see pp. 7-10, *supra*, prisoner placement is the sort of inherently discretionary and policy-based decision that falls within the scope of the discretionary function exception of the FTCA.

b. Petitioner's alternative claim (Pet. 16-17) that the Bureau breached non-discretionary duties by failing to follow the Manual in designating his assailant (Garcia) is both fact-bound and meritless. While petitioner contends that Garcia would not have been sent to a minimum security prison if Garcia's prior arrests and convictions had been listed on the Security Designation Form in either the Prior Commitments or the History of Violence sections, *ibid.*, the court of appeals correctly concluded that neither of Garcia's two prior arrests was suitable for inclusion in those sections, Pet. App. 5, at 12-13. Garcia's arrest of January 12, 1979, for posses-

sion and sale of cocaine, did not result in confinement (the judgment was "adjudication withheld" and a $500.00 fine, Pet. App. 9, at 6); and his arrest of July 26, 1983, for carrying a concealed firearm, possession of cocaine and "resisting arrest without violence," likewise did not result in a prison sentence, Pet. App. 9, at 6-7. Because "[c]ommitment is defined as any time for which the individual has been sentenced to confinement," Manual § 9, at 13 (App., *infra*, 30a), neither arrest was appropriate for inclusion in the history of commitment section. Pet. App. 5, at 13. Similarly, because neither the January 12, 1979, arrest nor the July 26, 1983, arrest was for violence—the arresting police department specifically described the latter as involving "resisting arrest without violence"—those offenses were properly excluded from the history of violence section as well. *Ibid.*

Moreover, Garcia's criminal background was expressly noted in the "Remarks" section of the Security Designation Form, which referred to Garcia's "extensive arrest record [without] prior commitments," and to the fact that Garcia's arrests were for possession of a machine gun, carrying a concealed weapon, and assault on a police officer. App., *infra*, 39a. The form counseled that once Garcia reached the institution where he was placed, that institution's staff should carefully review Garcia's record to determine if an appropriate placement had been made. See *id.* at 40a. The Security Designation and Classification Form, therefore, made a full disclosure of Garcia's background and even invited the authorities to re-evaluate Garcia once he arrived at the chosen institution. Because there was no omission on the form, there was no failure to follow the Manual's guidelines.

In any event, under the Manual, a court's decision to permit an offender to surrender voluntarily after conviction normally indicates that the offender should be placed in a Security Level 1 institution such as Jesup. Manual § 9, at 9 (App., *infra*, 24a). In this case, the sentencing court permitted Garcia to surrender voluntarily. For that reason too incarcerating Garcia in a minimum security facility was consistent with the Manual.[4]

4. Finally, petitioner asserts that the court of appeals erred in failing to remand for a determination as to whether the district court's judgment could be sustained under a theory of "constitutional tort." Pet. 16. That argument is incorrect. Even setting aside petitioner's admission that he failed to include such a claim in his complaint (and did not amend his complaint to include it after he became represented by counsel),

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[4] Even if petitioner were correct in his claim that an error of omission occurred in filling out the Security Designation Form, the record demonstrates that any such error did not proximately cause the injuries petitioner suffered. It is not disputed that the Security Designation Form itself instructed officials at Jesup to review Garcia's suitability for that penal institution upon his arrival, declaring "Institution staff; carefully review for S/L 1 appropriateness." (App., *infra*, 40a); that Garcia's qualifications were reviewed upon his arrival at Jesup, resulting in a finding that he was suitable for placement there (Tr. 137-138); that Garcia's suitability for Jesup was periodically reviewed, and he was found to be properly placed at that institution (Tr. 164); that Garcia had no history of violence at Jesup that would have alerted prison authorities there to a problem (Tr. 16); and that petitioner by his own admission never had any problem with Garcia prior to the assault, or any reason to complain to prison staff about Garcia (Tr. 88-89). Clearly then, even if some error occurred in filling out the Security Designation Form (and the court of appeals correctly found none), it was not the proximate cause of petitioner's injury.

ibid., any such remand would have been futile because liability for "constitutional torts" runs against individual officers and not against the government; it thus could not support the judgment against the United States entered by the district court. See *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396-397 (1971); *Meyer*, 510 U.S. at 484-486 (declining to "expand the category of defendants against whom *Bivens*-type actions may be brought to include not only federal *agents*, but federal *agencies* as well.").[5]

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[5] Alternatively, petitioner argues that the court of appeals should have remanded for inquiry into Garcia's status as an alien; aliens, he contends, cannot be assigned to "SL-1" facilities but instead must be assigned to facilities designated as "SL1-Out." Pet. 17. Petitioner, however, abandoned that theory at trial—in light of documentation indicating that Garcia is a United States citizen, Tr. 160-161, 165—and the theory is based on a misunderstanding of the system in any event. SL-1 through SL-6 designate the security level of the facility, while "Maximum," "In," "Out" and "Community" designate the level of custody for the individual; "Out" indicates that the individual is eligible for less secure housing within an institution and for work detail outside the perimeter of the institution. Compare Manual § 2, at 1 (describing the "six Security Levels" for institutions) (App., *infra*, 4a) with *id.* § 3, at 1-2 (describing the "four custody levels" for individuals) (App., *infra*, 6a-8a). The Manual makes it clear that deportable aliens, and other individuals whose custody level is designated as "Out," may be placed in Security Level 1 ("SL-1" or minimum security) facilities. Manual § 5, at 4 ("Placement [of a deportable alien] can be made in an SL-1 facility with Regional Director approval provided such placement is consistent with the inmate's security requirements.") (App., *infra*, 17a); *id.* § 9, at 9 (similar) (App., *infra*, 24a); see also *id.* § 10, at 1 (App., *infra*, 37a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999

APPENDIX A

SECURITY DESIGNATION AND CLASSIFICATION MANUAL

U.S. Department of Justice
Federal Prison System

Washington, D.C. 20534

OPI:	CORR
Number:	5100.2
Date:	October 7, 1982
Subject:	SECURITY DESIGNATION AND CLASSIFICATION SYSTEM

Program Statement

EFFECTIVE DATE: December 1, 1982

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1. PURPOSE. To transmit a new manual of policy and instructions for designating (and redesignating) institutions according to Security Level and for assigning Custody Classifications.

2. DIRECTIVE RESCINDED. P.S. 5100.1, *Designation (Security) and Custody Classification System.*

3. DIRECTIVES REFERENCED.

   a. P.S. 5070.1, (1/16/75), *Report on Sentenced Offenders by United States District Judges, Form 235.*

   b. P.S. 5070.3, (1/02/79), *Study and Observation Cases and Competency Commitments, Title 18,*

U.S. Code 4205(c), 5010(e), 5037, 4244 and 4246.

c. P.S. 5270.5, (8/12/82), *Inmate Discipline.*

d. P.S. 7300.5, (1/15/82), *Community Programs Managers Manual.*

e. P.S. 5180.2, (5/14/82), *Central Inmate Monitoring System*

f. P.S. 5251.3, (7/13/82), *Youth Corrections Act Institutions and Programs*

g. P.S. 5010.1, (8/28/74), *Designation of State Institutions for Service of Federal Sentences*

h. P.S. 5140.14, (1/8/80), *Juvenile Delinquents/Juvenile Justice & Delinquency Prevention Act of 1974*

4. BACKGROUND. A task force was established in January 1977 by the Executive Staff to study the Federal Prison System's inmate classification procedures. The findings of the task force revealed classification inconsistencies and a need to develop a system which would ensure appropriate designations, as well as a method of assigning custody levels that would place an inmate in the least restrictive environment which would provide appropriate control. The first Manual was issued in February 1979, and in July 1980, the entire Manual was reissued. Since then, there have been other page changes.

   The intent of the Security Designation and Custody Classification System is for staff to use professional

judgment within specific guidelines. While the system is flexible, it provides a basis for more consistent decision-making across the Federal Prison System.

5. ACTION. Designations and Custody Classifications shall be made in accordance with the guidelines in this Manual.

/s/ NORMAN A. CARLSON
NORMAN A. CARLSON
Director

INTRODUCTION

Institutions in the Federal Bureau of Prisons are grouped into six Security Levels and an Administrative category (for which non-security considerations outweigh security concerns). Seven factors are evaluated to determine an institution's Security Level: 1) perimeter security; 2) towers; 3) external patrol; 4) detection devices; 5) security of housing areas; 6) type of living quarters; and 7) level of staffing per population size.

Designation of an institution for receipt of a particular inmate involves two steps: a) completion of a Security Designation Form, which specifies the security needs of the incoming offender; and b) consideration by the Regional Designator of several management variables: age, Central Inmate Monitoring assignment, release residence, judicial recommendation, degree of overcrowding, racial balance, sentence limitations, and additional considerations.

The designation system is designed to keep the inmate population of the Federal Bureau of Prisons in balance, decrease the number of transfers for custody purposes, reduce the number of inmates who request placement in Administrative Detention for their own protection, eliminate preferential "transfer arrangements" between institutions, and aid the Bureau's administrators in making better use of available resources.

Initial designations are accomplished by the respective Regional Designator with input from local Community Programs Managers. Likewise, subsequent re-designations (transfers) are accomplished by the Regional Designator based on institutional evaluation of the inmate's case. The Custody Classification form may recommend a change to a different appropriate security level for an inmate based on a point total and the relationship between both pre- and post-commitment variables.

Designations of non-federal facilities are completed by a Community Programs Manager, after appropriate consultation with the respective Regional Designator. A Security Designation Form is not required on cases so designated; i.e., all juvenile commitments, many short-termers, and some females.

Four custody levels are established: MAXIMUM, IN, OUT, and COMMUNITY. In order to place an inmate in the lowest appropriate custody classification, the system assigns points to a six post-commitment variables. The sum of those points (relative to the inmate's security level) offers a guideline for custody assignment changes.

The intent of this process is for staff to use professional judgment within specific guidelines. The system was designed to emphasize staff flexibility in decision-making, yet provide a basis for more consistent decision-making across the Federal Bureau of Prisons.

As part of an on-going effort to monitor and evaluate the security needs of the Bureau of Prisons, periodic reports focusing on Designation and Custody Classification, Escapes and Disciplinary actions, are maintained on a regular basis (Appendix A).

DEFINITIONS

1. ADMINISTRATIVE INSTITUTIONS. Facilities to which inmates are assigned based on factors other than security (for example, medical needs).

2. CLASSIFICATION. The systematic subdivision of inmates into groups based upon their security and program needs.

3. CUSTODY CLASSIFICATION. The degree of staff supervision required for an individual inmate. (See Appendix D for escort instructions.)

   A. MAXIMUM. Inmate requires maximum control and supervision. This classification is for individuals who, by their behavior, have identified themselves as assaultive, predacious, riotous, serious escape risks, or seriously disruptive to the orderly running of an institution.

      These individuals may be restricted from some work and cell assignments, as well as from parts of the institution (e.g., tunnels), as deemed appropriate by the Warden, for security reasons. (This differs from Control Unit status, since those individuals cannot be let out of their individual cells without staff escort.) At least two staff members are required for escorted trips of a routine or emergency nature outside the institution, and handcuffs with the C&S Handcuff Cover, Martin chains, and leg irons will be

used at all times for these individuals. Authority for such trips requires the Warden's approval. An inmate in MAXIMUM custody may not be placed in an outside hospital under contract guard supervision; supervision shall be provided only by experienced Federal Bureau of Prisons employees.

B. IN. Inmate is assigned to regular quarters and is eligible for all regular work assignments and activities under normal level of supervision but *not* for work details or programs outside the institution's secure perimeter. Two staff members are to be used for escorted trips of a routine or emergency nature outside the institution, and handcuffs with Martin Chains will be used at all times; other restraint equipment may be used at the discretion of the escorting officers. The Warden may permit an illegal alien in IN custody to be escorted by *one* staff member.

C. OUT. Inmate may be assigned to less secure housing and is eligible for work details outside the institution's perimeter with a minimum of two-hour intermittent staff supervision. For escorted trips, of a routine or emergency nature outside of the institution, restraints may be used at the discretion of the escorting officer.

[§ 3, p. 2]

D. COMMUNITY. Inmate is eligible for the least secure housing, including any which is outside the institution's perimeter, may work on outside details with minimal super-

vision, and is eligible for community-based program activities. These individuals may travel on routine or emergency trips outside of the institution without escort (in furlough status) or may be escorted without restraints.

4. MANAGEMENT VARIABLES. Considerations which in addition to security considerations, may significantly affect a designation or redesignation decision:

   A. Judicial Recommendation. Through the use of Form AO 235 and/or the Judgment and Commitment papers, a court may recommend a specific institution or program for an offender.

   B. Age. An offender's age may be the determining factor in certain placements. For example, Leavenworth would not be appropriate for most 20-year old inmates. This management variable is to be used only when age is the determining factor in making the placement.

   C. Release Residence Area. It is the policy of the Federal Bureau of Prisons to place each inmate in an institution that is appropriate in security level and is geographically as close to the anticipated release area as is possible and reasonable.

   D. Overcrowding. The Assistant Director, Correctional Programs Division, sets and adjusts institutions' Operational Capacities in order to accommodate overcrowding and balance population.

E. Racial Balance. It is the Federal Bureau of Prison's intent that one racial group should not be assigned disproportionately to one particular work detail or to one housing unit. Attention must also be given to the racial balance maintained across institutions. Therefore, Designators need to be aware of the proportion of inmates in each racial group at institutions and attempt to keep those proportions in balance.

F. Central Inmate Monitoring Assignment. Pursuant to Program Statement 5180.2, those individuals who, for specified reasons, need to be monitored or separated from others are assigned accordingly.

G. Designation Limitations.

(1) Misdemeanants. An inmate convicted of an offense for which the maximum penalty is one year or less may not be transferred to a Security Level 5 or 6 facility without first signing a waiver. A sample of the waiver form is at the end of Section 12.

[§ 3, p.3] (2) Narcotic Addiction Rehabilitation Act (NARA). Preference is given for a NARA commitment to remain in the originally designated institution to complete the specialized drug abuse program. * * *

(3) Youth Corrections Act (YCA). An offender sentenced under 18 USC Section 5010(b), 5010(c), 3401(g), or 5010(e), may be designated only to an

institution specifically designated as a YCA institution or otherwise in compliance with special procedures regarding YCA inmates.

* * * * *

(4) Study Case. An offender sentenced under 18 USC 4205(c) or 5010(e) will be placed for study at the nearest appropriately staffed and secure facility. (See later references regarding the specific type of case to be placed.)

(5) An inmate serving a split sentence under 18 USC, Section 3651, may be confined only "in a jail-type or treatment institution" and may not be transferred to a Security Level 5 or 6 facility unless serving a concurrent adult felony sentence.

(6) Psychiatric. An inmate who has a current history or is presently exhibiting psychiatric problems which indicate the need for an initial designation to a Psychiatric Referral Center.

(7) Medical. Documented information which reflects that the inmate is in need of medical or surgical inpatient treatment in a Medical Referral Center.

H. Additional Considerations. Constraints may be placed on a designation because of:

(1) Medical Health (NOT requiring an initial designation to a Medical Referral Center)

(2) Mental Health (NOT requiring an initial designation to a Psychiatric Referral Center)

(3) Aggressive Sexual Behavior

(4) Deportable Alien

[§ 3, p. 4] (5) Threats to Governments Officials

(6) Greatest Severity Offense

(7) High Severity Drug Offense

(8) Racketeer Influenced and Corrupt Organizations or Continuing Criminal Enterprise

(D) Disruptive Group

I. Parole Hearing. Sometimes it is necessary to place an inmate at a particular institution temporarily in order to have a parole hearing within certain time limits. * * *

J. Voluntary Surrender. If the Court permitted the offender, after conviction and sentencing, to voluntarily surrender to the U.S. Marshal or to the designated institution, with or without financial obligation, the Designator shall normally designate a Security Level 1 institution. If there is reason to believe that an SL-1 institution is not appropriate, the Regional Director or designee

shall designate a higher security Level institution, as is appropriate, using the Security Point Total as a guide.

5. SECURITY LEVEL. One of six categories of facilities, based on structural restraints variables. (See Section 4.)

6. DESIGNATION. An order from the Regional Office, Central Office or Community Programs Manager (CPM) indicating the initial facility of confinement for an inmate.

7. SECONDARY DESIGNATION. Designation of an institution to which an inmate is to be moved after completion of some treatment, program, or process.

8. REDESIGNATION. An order from the Regional Office, Central Office or CPM indicating an institution to which an inmate is to be transferred.

9. TRANSFER. The movement of an inmate from one facility to another.

10. PRIOR COMMITMENT. A sentence of confinement for any length of time but served previous to the present sentence.

11. HISTORY. The individual's entire background of criminal convictions, including findings by an Institution Discipline Committee, but excluding the current offense.

* * * * *

Section 5
Page 1
5100.2 CN-8
August, 1, 1985

SECURITY DESIGNATION PROCEDURES
(NEW COMMITMENTS)

No more than 72 hours should pass from the time the U.S. Marshall requests a designation until the Regional Designator renders a designation. Generally, Community Programs Mangers should use no more than 48 hours and the Regional Office no more than 24 hours. The following is the normal chronology of a designation:

1. Offender is sentenced.
2. Clerk of Court sends Judgment and Commitment ("J&C") papers to Marshal.
3. Marshal assigns an eight-digit register number, Marshal requests, via teletype, designation from appropriate Community Programs Manager (CPM). A copy of the designation request is also routed to the USM Prisoner Transportation Division (PTD) in Kansas City.
4. CPM contacts U.S. Probation Office for two copies of Pre-Sentence Report, requests a copy of the Judgment and Commitment papers from Marshal, and from the gathered data, determines whether a non-federal facility should be designated (after appropriate consultation with Regional Designator).
   * * *
5. If it is determined that a designation to a non-federal facility is to be made, the procedure outlined in Section 7, Designations to Non-Federal Facilities, is followed.

6. CPM uses SENTRY to determine if special CIM precautions need to be taken. This includes a name search to determine if the offender was previously confined under a current or previous register number. If new to the Federal Bureau of Prisons, the inmate must be loaded into SENTRY and "admitted" to the CPM "facility" with any appropriate CIM assignments entered.

7. If designation is to be made to a federal institution, the CPM completes the Security Designation Form and enters it into SENTRY. This operation generates an automatic notification to the Regional Office that a designation is needed. CPM then "releases" the inmate from the CPM "facility."

[§ 5, p. 2]

8. Regional Designator checks SENTRY movement (DST) daily log to find out which inmates are awaiting designation.

   Based on the BP-14 information entered in SENTRY by the CPM, the Regional Designator determines whether the designation should be based solely on Security Level or on one or more of the following overriding Management Reasons:

   Management Reasons

   A. Judicial recommendation

   B. Age

   C. Release residence

   D. Overcrowding

   E. Racial balance

   F. Central Inmate Monitoring Assignment

G. Designation limitations

(1) Misdemeanor sentence

(2) Narcotic Addict Rehabilitation Act sentence

(3) Youth Corrections Act sentence

(4) Sentenced and unsentenced study case

(5) Split sentence (18-3651)

(6) Psychiatric

(7) Medical

H. Additional considerations

(1) Medical Health

(2) Mental Health

(3) Aggressive Sexual Behavior

(4) Deportable Alien

(5) Threats to Government Officials

(6) Greatest Severity Offense

(7) High Severity Drug Offense

(8) Racketeer Influenced and Corrupt Organizations or Continuing Criminal Enterprise

(9) Disruptive Group

I. Parole Hearing

J. Voluntary Surrender

[§ 5, p. 3]

9. SENTRY provides information on the capacities and inmate populations in each institution, as do Reports 70-51A and 70.51B on "Federal Prisoners Confined." That information is used by Regional Desig-

nations and others as a guide for population management.

10. Regional Designator designates an institution, notes the Management Reasons applied, if any, and specifies the source of any CIMS documentation used.

11. When the Regional Designator notes that the CPM has marked Items 6 and/or 7 of the Designation Limitations Section of the BP-14, or when there is other substantive information, the Designator will normally consult with the RAM for the appropriateness of a medical/psychiatric Referral Center Designation. * * *

* * * * *

12. CPM checks DST logs daily for designations. When a designation is made, CPM sends all supporting documents to the designated institution.

13. U.S. Marshals Prisoner Transportation Division in Kansas City uses SENTRY daily log to determine the designation made and will schedule delivery of the inmate to the designated facility.

[§ 5, p. 4]

14. Within ten days of notification of the designation, the institution reviews designation information in SENTRY and immediately reports any apparent errors to the Regional Designator who made the designation, if the changed Security Total would indicate a different Security Level. If a designation is changed, the Regional Designator shall assure that the orginating CPM and Prisoner Transportation Division, Kansas City, Missouri, are informed of the change and the reason for the change.

15. Institution contacts designating CPM if the inmate has not arrived within 120 days of the designation date. * * *

16. EXCEPTIONS. (See NOTE at bottom of Page 5)

    A. If the inmate is a juvenile or "short-termer," a Security Designation Form is not required and the CPM may designate a federal or contract facility. * * *

    B. Sentenced Study Cases. The CPM shall complete a Security Designation Form and enter it into SENTRY. The Regional Designator shall designate an appropriate institution for the study. * * *

    C. Deportable Alien. If a Designator determines that a contract jail is not appropriate for a deportable alien and that BOP institution is indicated, the alien will be designated to an institution which is commensurate with his security needs, but no lower than an SL-2 facility. Placement can be made in an SL-1 facility with Regional Director approval provided such placement is consistent with the inmate's security requirements.

    D. District of Columbia Superior Court Designations are made only by the Central Office. The Federal Bureau of Prisons cooperates with the D.C. Superior Court by assisting in the management of inmates for whom resources may not be available within the D.C. Department of Corrections.

* * * * *

Section 9
Page 1
5100.2 CN-8
August 1, 1985

SECURITY DESIGNATION FORM INSTRUCTIONS*
IDENTIFYING DATA INMATE LOAD DATA:

1. Register Number: Enter the identifying number, assigned by the U.S. Marshal at the time of inmate designation to an institution for this charge/offense, regardless of the method of commitment.

* * * * *

2. Last Name: The length is 1-24 spaces. The first character must be a letter. Each character after the first, if entered, must be a letter, space, hyphen, or apostrophe. The name used should be the name under which the person is committed.
3. First Name: The length is 1-12 spaces. Same edit as last name.
4. Middle: The length is 1-8 spaces. If entered, edit same as last name.
5. Suffix: The length is 1-3 spaces. If entered, must be valid code found in Name Suffix Table 7 SENTRY Codes.
6. Race: Enter appropriate code:

* * * * *

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* Security Designation Form BP-14, Inmate Load Data Section only the name and register number are required if the inmate record has been previously created (Reference Inmate Load Transaction, SENTRY Manual).

7. Ethnic Orgin: Enter the appropriate code:

* * * * *

8. Sex: Enter either:

   M = Male
   F = Female

9. Date of Birth: The length is 10 spaces.

   - MM-DD-YYYY format

* * * * *

10. Offense/Charge/Sentence: Enter the Offense(s). Enter the length of sentence, e.g., "5 years," or "2 years, 6 months."

11. FBI Number: The length is 1-9 spaces.

* * * * *

12. Height: FT-the values must be 1 thru 9 and represent feet. IN-the values must be 00 thru 11 and represent inches.

13. Weight: Must be values 001-999 and represent pounds.

14. Social Security Number: The length is 9 spaces.

* * * * *

15. Eyes: The length is 2 spaces. If entered, must be valid code found in eye color code table 18 SENTRY codes.

16. Hair: The length is 2 spaces. If entered, must be valid code found in hair color table 19 SENTRY codes.

17. State of Birth: The length is 2 spaces. If entered, must be valid code found in state possession SENTRY code table 5.

[§ 9, p. 4]

18. Or Country of Birth: If entered, must be valid code found in Country Code Table 6; Cannot be "US"; and cannot be entered if state of birth entered.

19. Citizenship: Enter Country of which inmate is a citizen must be a valid code found in country code table 6 SENTRY manual.

20. Address - Street: The length is 1-28 spaces. * * *

21. Address - City: The length is 1-15 spaces. * * *

22. Address - State: The length is 2 spaces. If entered, must be valid state code found in state/ possession code table 5, SENTRY.

23. Zip Code: The length is 5 spaces. If entered, state address must be entered.

24. Or Foreign Country: The length is 2 spaces. * * *

25. Remarks: The length is 1-62 spaces. Any combination of alphanumeric characters.

    NOTE: (Instructions to U.S. Marshals about special requirements of an offender shall be included here. For example, critical health problems, history of suicide attempts.

SECURITY DESIGNATION DATA:

1. Designation Limitations: Enter the appropriate codes identifying 1-3 of the following types of sentences that would require a management designation:

Code	Item	Definition
0	None	No sentence limitation
1	Misdemeanor	A misdemeanant is an individual committed for an offense for which the maximum penalty that can be imposed is one year or less. An individual with this type of sentence cannot be confined in a penitentiary (SL-5 or S-6) without a waiver.
[§ 9, p. 5] * * *		Assignment to a Metropolitan Correctional Center or detention facility does not require a waiver.
2	Narcotic Addict	Individuals sentenced under this Act must be confined at an institution with a Drug Abuse Program, including those sentenced for a 4252 study.

3	Youth Corrections Act	An offender sentenced under 18 USC Section 5010(b), 5010(c), 3401(g), or 5010(e) may be placed only at an institution specifically designated as a YCA institution or otherwise in compliance with special procedures regarding YCA inmates.
4	Study Cases	Prior to implementation of a final sentence, United States Courts may commit individuals for periods of study and observation under Title 18 USC, Section 4205(c) or 5010(c). Study cases are normally assigned by the Regional Office unless there are Designation Limitations of medical or psychiatric conditions. * * *
5	Split Sentence	An inmate serving a split sentence may be confined only in an SL-1 through SL-4 institution. An inmate serving an adult concurrent sentence may be considered for other types of institutions.

[§ 9, p. 11]

6	Psychiatric	Community Programs Managers will be responsible for reviewing and evaluating available information to determine whether the inmate requires mental health evaluation and/or treatment in a psychiatric referral center. * * *

* * * * *

7	Medical	When reviewing and gathering information pertaining to an initial designation, the Community Programs Manager (CPM) must attempt to ascertain whether an inmate requires medical or surgical inpatient treatment in a medical referral center. * * *

* * * * *

2. Additional Considerations: Enter the appropriate code number reflecting 1-5 of the following factors that may result in a management designation. Additionally, Items A thru E may also be considered when making a designation decision. However, these items are not "loaded" at the time of designation because they have been previously entered into the data system. Note that these items are not mutually exclusive; that is, one or more codes may be appropriate. The variable should be written out in full in the Remarks Section.

Code	Item	Comments
0	None	None
1	Medical Health	If the individual has medical problems that should be taken into consideration in the designation process, but does not require an initial designation to a medical referral center, the CPM should mark this section. * * *

[§ 9, p. 9]

2	Mental Health	If there is information in the individual's background which reflects previous mental health problems that need to be considered in the designation process, but does not require an initial designation to a psychiatric referral ceter, the CPM will mark this item * * *
3	Aggressive Sexual Behavior	If an individual has a history of, or is committed for, a crime involving aggressive sexual behavior, an SL-1 facility on a military base cannot be designated. Other SL-1 institutions are not necessarily precluded, although cautious judgment must be applied when considering any SL-1 institution or a co-correctional institution.
4	Deportable Alien	An offender with a detainer for deportation or the probability of receiving one. A deportable alien is to be designated to an institution which is commensurate with his security needs, but not lower than an SL-2 facility. Placement can be made in a Security Level 1 facility with Regional Director approval provided such placement is consistent with the inmate's security requirements.

5	Threats to Government Officials	Offenders convicted of violence to government officials cannot be assigned to any SL-1 facility, unless approved by the Regional Director or designee. (These cases will be referred for CIMS assignment.)

[§ 9, p. 10]

6	Greatest Severity Offense	An offender committed for an offense in the Greatest Severity category may not be initially placed in an institution lower than SL-3, unless approved by the Regional Director or designee.
7	High Severity Drug Offense	An offender committed for a drug Drug offense in the High Severity category and is considered to be a leader or prime motivator of a organized and sophisicated criminal operation, may not be initially placed in an institution lower than SL-2, unless approved by the Regional Director or designee.
8	Racketeer Influenced and Corrupt Organizations or Continuing Criminal Enterprise	An inmate sentenced under 18 USC 1961 or 21 USC 848, may not be placed in an institution lower than SL-2 for at least the first year of commitment, unless approved by the Regional Director or designee, and must be referred as CIM case.
D	Disruptive Group	Any inmate confirmed as a Member of a disruptive group as

outlined in P.S. 5180.2, Central Inmate Monitoring System, may not be designated or redesignated to an institution lower than SL-4, unless approved by the Regional Director or designee. The Designator will consult with the Regional Correctional Services Administrator prior to any move ment.

3. *USM Office*: Enter the location of the USM office. e.g., Detroit.

4. *Judge*: Enter the Sentencing Judge's last name.

5. Recommended Facility: Enter the name of the institution recommended. Through the use of Form AO 235 and/or the Judgement and Commitment papers, the court may recommend a specific institution or program for newly committed offenders. If it is within the security group for which the individual properly qualifies, every effort shall be made to assign the inmate to the indicated facility within the security group.

[§ 9, p. 11]

* * * * *

6. Recommended Program: Enter the program recommended in the Judicial Documents, if any. If a program is available within the security group for which the individual properly qualifies, every effort shall be made to assign the inmate to the indicated facility which offers the program within the security group.

* * * * *

NOTE: Only one number can be assigned for the following items. Points cannot be added.

7. Type of Detainer: Enter the appropriate number of points in the box in the right-hand column to reflect detainer status. Refer to the Severity of Offense Scale, Section 17. Assign and enter highest number of points appropriate. Determination is based on the nature of the charge of the most serious detainer:

   (a) If it is a pending charge, points based on the documented behavior are assigned ONLY on the Detainer Item (Security Designations Data, Item #7 on BP-14);

   (b) If it is an adjudicated sentence AND that sentence is absorbed within the federal sentence for which the inmate is currently incarcerated, the documented information is used in the appropriate "history" item—either History of Escape or History of Violence; or

   (c) If it is an adjudicated sentence AND that sentence is not absorbed within the federal sentence for which the inmate is currently incarcerated, this material should be considered as a detainer and treated as described in (a).

   If law enforcement officials indicate a firm intent to lodge a detainer, treat it as lodged. Treat a state sentence as a detainer only if it is expected that the sentence will exceed the federal sentence. Otherwise, treat the state sentence as a "history" item as indicated in (b) above.

[§ 9, p. 12]

POINTS	DETAINER
0	None
1	Lowest and Low Moderate Severity
3	Moderate Severity
5	High Severity
7	Greatest Severity

Example: Individual with two detainers for Violation of Firearms Act (Moderate Level) and one for Extortion (High), use High = 5 points and enter "5" in box in right-hand column.

8. Severity of Current Offense: Enter the appropriate number of points in the box in the right-hand column to reflect the severity of the documented offense behavior of the most severe of the offenses for which the individual was sentenced on this period of incarceration. Severity is determined by using the Severity of Offense Scale (Section 17). Do not use this same information to assign points on the history items (#11 and #12). If offense involves drugs, use Drug Enforcement Administration list in Section 16 on "Street Values of Drugs" to convert pounds or kilos to dollar value.

POINTS	SEVERITY
0	Lowest
1	Low Moderate
3	Moderate
5	High
7	Greatest

Example: For example, if (according to the Pre-Sentence Report) the individual was involved in an

Armed Robbery of a Bank (which would fall in the Greatest category on the Severity of Offense Scale) but plead guilty to a simple Robbery offense (which would be in the High category) assign the points on the basis of the more severe, documented behavior, i.e., assign 7 points. DO NOT USE THIS SAME INFORMATION TO ASSIGN POINTS ON THE HISTORY ITEMS (#11 and #12).

NOTE: ANY CASE SCORING IN THE GREATEST CATEGORY (7 points) WILL BE INITIALLY DESIGNATED TO A SL-3 OR HIGHER INSTITUTION (or Administrative Facility). ANY CASE SCORING IN THE HIGH CATEGORY FOR A DRUG OFFENSE WILL BE INITIALLY DESIGNATED TO AN SL-2 OR ABOVE FACILITY.

9. EXPECTED Length of Incarceration: Enter the appropriate code reflecting the expected length of incarceration in the right-hand column. IN ADDITION, ENTER TO LEFT OF COLUMN THE ACTUAL NUMBER OF MONTHS TO WHICH THE INMATE WAS SENTENCED. The code is completed by using the Expected Length [§ 9, p. 13] of Incarceration Scale in Appendix E. If the inmate is sentencing under YCA or NARA, the second column, "(YCA)", is used. If the inmate's sentence is less than the number of months shown in the table, use the length of sentence.

POINTS	EXPECTED LENGTH
0	0 - 12 Months
1	13 - 59 Months
3	60 - 83 Months
5	84 Plus Months

Example: An Adult convicted of Breaking and Entry (48 Months in Appendix E) and sentenced to 8 years: Enter "1" in the box in the right-hand column and to the left of the column write "96". If the inmate had received only a two year sentence, 24 months would be the expected length of incarceration: Enter "1" in the box and "24" to the left of the column.

NOTE: Life sentence equals 45 years or 540 months = 5 points. Be sure to aggregate consecutive federal sentences.

10. Type of Prior Commitments: In the right-hand column, enter the appropriate number of points reflecting category of prior commitment history. This is determined by the kind of prior institution experience during the inmate's criminal career and is based on the nature of the most severe offense, Section 17, which resulted in commitment. Commitment is defined as any time for which the individual has been sentenced to confinement. MINOR = Lowest and Low Moderate offense which resulted in incarceration. SERIOUS = all offenses in the Moderate, High, and Greatest categories which resulted in incarceration. See Severity of Offense Scale, Section 17. Documented information from juvenile adjudications can be used, unless the record has been expunged.

POINTS	TYPE
0	None
1	Minor
3	Serious

Example: If an individual has a previous incarceration for a crime which falls in the High category on

the Severity of Offense Scale, such a prior incarceration would be considered Serious = 3 points. Enter "3" in the box in the right-hand column.

[§ 9, p. 14]

11. History of Escape or Attempts: Enter the appropriate number of points in the right-hand column to reflect the escape history of the individual. History includes the individual's entire background of escapes or attempts to escape from confinement, excluding the current offense. Escapes or attempted escapes are to be recognized if the inmate was found to have committed the prohibited act of the escape or attempt by an Institutional Discipline Committee regardless of the prosecution and conviction status of the case. State disciplinary findings shall be used. Also, consideration is given to behavior relating to a prior offense, (such as flight to avoid prosecution). DO NOT use behavior related to current offense for this item. If there were more than one escape attempt, use most severe. Failure to appear for traffic (automobile) violations, and runaways from foster homes are not to be considered. The length of time begins with the date of documented occurrence. Documented information from juvenile adjudication can be used, unless the record has been expunged. Indian Tribal Court convictions are misdemeanors and therefore "minor."

* * * * *

[§ 9, p. 16]

12. History of Violence: Enter the number of points reflecting the appropriate category in the right-hand column. History of violence includes the individual's entire background of criminal violence,

excluding current offense. However, Institution Discipline Committee findings of commission of the prohibited act are to be recognized regardless of prosecution and conviction status, if known. State disciplinary findings shall also be used. DO NOT use behavior related to current offense for this item. Severity of violence is defined according to the degree of seriousness of the act which resulted in a conviction or finding of guilt. If there is more than one incident of violence, the most serious is used to determine severity. The length of time begins with the date of conviction. Documented information from juvenile adjudication can be used, unless the record has been expunged. Indian Tribal Court convictions are misdemeanors and therefore "minor."

POINTS	HISTORY	DEFINITION
0	None	No violence
1	>10 Minor	Acts occurring more than ten years ago involving persons or property which resulted in convictions (e.g., simple assault, fights, domestic squabbles)
2	5-10 Minor	Acts occurring more than five but less than ten years ago involving persons or property which resulted in convictions (e.g., simple assault, fights, domestic squabbles)

3	<5 Minor	Acts occurring within the last five years involving persons or property which resulted in convictions (e.g., simple assault, fights, domestic squabbles)
4	>15 Serious	Acts occurring more than fifteen years ago involving persons or property which resulted in conviction (e.g., aggregated assault, intimidation involving a weapon, incidents involving arson or explosives, etc.)

[§ 9, p. 17]

5	10-15 Serious	Acts occurring more than ten but less than fifteen years ago involving persons or property which resulted in conviction (e.g., aggravated assault, intimidation involving a weapon, incidents involving explosives, etc.)
6	5-10 Serious	Acts occurring more than five but less than ten years ago involving persons or property which resulted in conviction (e.g., aggravated as-

		sault, incidents involving arson or explosives, etc.
7	<5 Serious	Acts occurring within the last five years involving persons or property which resulted in convictions (e.g., aggravated assault, incidents involving arson or explosives, etc.)

Example: If an individual has a history of being fined for drunken fights—12 years ago—this would rate as >10 Minor, and "1" would be entered in the right-hand column.

13. Pre-Commitment Status: Refers to person's status preceding, during, and following trial period. Enter the appropriate number of points.

POINTS	PRE-COMMITMENT STATUS	DEFINITION
0	Not Applicable	Individual was not on own recognizance and did not voluntarily surrender.
-3	Own Recognizance	Individual was released prior to (or during) the trial period without posting bail or incurring any other financial obligation to ensure appearance. Ignore if there is any sign of bail violation, failure to appear etc.

[§ 9, p. 18]

-6	Voluntary Surrender	Individual was not escorted by a law office or to the place of confinement. Ignore if violated or not successfully completed.

***NOTE*: If the Court permitted the offender, after conviction and sentencing, to voluntarily surrender to the U.S. Marshal or to the designated institution, with or without financial obligation, the Designator shall normally designate a Security Level 1 institution. If there is reason to believe that an SL-1 institution is not appropriate, the Regional Director or designee shall designate a higher Security Level institution, as is appropriate, using the Security Point Total as a guide. (If placement is at an SL-1 institution because of the Voluntary Surrender, Management Reason "10—Voluntary Surrender" should be noted on the BP-14.**

When a Court does not establish a surrender date, CPM will contact the Court to establish a date. This must be included in the CPM's designation request. The Regional Designator shall check on all voluntary surrender cases to ensure that a reporting date has been set.

14. If eligible for SL-1, is there any medical reason that would preclude designating a camp? Some types of Security Level 1 facilities (e.g., independent camps, etc.) are not equipped to treat individuals with acute medical and dental problems; therefore, the Regional Designator requires this information in

order to make a proper designation. (Also, see this Section, Page 5).

Y = Yes N = No

15. Remarks: Enter any relevant information not already recorded that may have an impact on the designation process or the transportation of the inmate. (See Section 5, Page 1).

* * * * *

CUSTODY CLASSIFICATION
INTRODUCTION

When a newly committed offender arrives at the designated institution, the individual is automatically assigned a custody level:

Security Level of Designated Institution	Inmate's Initial Custody Level
SL-1	OUT
SL-2, SL-3, SL-4, SL-5	IN
SL-6	MAX
Administrative Facility	IN (Except for SL-1 offenders who are assigned OUT)

All subsequent custody level changes require the completion of a Custody Classification Form. These custody reviews will be made by the Unit Team in accord with the established custody review time schedule (See Section 11, Page 15).

The guiding principle is that every inmate should be in the lowest custody level deemed appropriate to adequately supervise that individual. It should be clearly understood that the Custody Classification Form only recommends, and the Team decides. As stated in Section 2, the intent of the Custody Classification system is to permit staff to use professional judgment within specific guidelines. Custody changes are not "automatic" or "mechanical" or dictated by a point total on a form. In every instance, if the Team decides not to

follow the recommendation of the Form BP-15, the Team must document its reasons and inform the inmate concerning the decision.

APPENDIX B

SECURITY DESIGNATION FORM FOR HUMBERTO GARCIA

SECURITY/DESIGNATION DATA

SERA4 600.00 09-12-1995

PAGE 001 OF 001 11:09:12

REGNO: 41734-004

NAME: GARCIA, HUMBERTO ORG: CFL

SEX/AGE: W/M/36 FORM D/T: 11-28-1990/1404

RES: MIAMI, FL 33187

OFFN/CHG: POSS. WITD COCAINE/63 MONTHS

CUSTODY: BIL: D/LIMITS: NONE

AD/CONSID: NONE

CIM CONSID:

JUDGE:	KING	REC RACL:
DETAINER:	NONE	SEVERITY: MODERATE
PRIOR:	NONE	ESCAPES. : NONE
PRECOMMT:	VOL SURR	V/S DATE: 01-09-1991
EXC CAMP:	NO	SEC TOT..: 0

USM: MIAMI

REC PROG:

LENGTH: 13-59 MOS (063)

VIOLENCE: NONE

V/S LOC: INSTI.

SEC LEV: S1

CCM RMKS: EXTENSIVE ARREST RECORD W/O PRIOR COMMITMENTS TO INCLUDE POSS. MACHINE GUN, CARRYING CONC. F/A, AND ASSLT. ON POL. OFC.

FACL DESIG:	JESUP FCI SAT CAMP
DESIGNATOR:	SER JAP DATE: 11-29-1990
DESIGN REAS:	MGMT MGMT: OTHER INFORMATION
SEN:	N/A
DESIG RMKS:	INSTITUTION STAFF; CAREFULLY REVIEW FOR S/L 1 APPROPRIATNESS

* * * * *

Supreme Court U.S.
FILED

981340 FEB 17 '99

OFFICE OF THE CLERK

In the United States Supreme Court

WILLIAM COHEN,
Plaintiff-Appellant

vs.

Docket No. _____
October 1998 Term

UNITED STATES OF AMERICA
Defendant-Appellee

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

11th Circuit Docket No. 97-8737

Submitted on behalf of Plaintiff William Cohen by
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by Allan S. Falk, Esq.
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6 RP

In the United States Supreme Court

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APPENDICES

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM COHEN,
Plaintiff,

V.

CIVIL ACTION
NO. CV294-179

UNITED STATES OF AMERICA
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action by Plaintiff, William Cohen, pursuant to the Federal Tort Claims Act, 28 USC § § 1346(b) and 2671. In substance, Cohen alleges that the Bureau of Prisons failed to protect him adequately and subjected him to an unreasonable risk of harm from a brutal physical assault by another inmate during Cohen's incarceration.

The case came on for a bench trial on April 28, 1997, and after hearing evidence and arguments of counsel, the Court enters the following findings:

FINDINGS OF FACT

1. Cohen formerly was an inmate at the Federal Correctional Institute in Jesup, Georgia, where he was registered as Federal Register Number 12639-039.

2. Cohen was convicted of infringement of copyright laws and trafficking in counterfeit labels, and sentenced to an eighteen month period of confinement.

3. Cohen began to serve his sentence in February of 1991, when he was sixty years of age.

4. On February 12, 1991, Cohen was designated to the Federal Prison Camp at FCI Jesup, which is a minimum security level satellite camp.

5. On February 8, 1992, Cohen and six or seven other inmates, including Humberto "Bert" Garcia, Federal Register Number 41734-004, were watching television in a television viewing room at FCI Jesup Prison Camp.

6. According to the institution's schedule, inmates were permitted to see and hear the evening news in the television room.

7. While listening to the news on the appropriate channel, Garcia abruptly changed the channel to one showing belly dancers. Cohen reminded Garcia of the institution's schedule and returned the TV channel back to the news.

8. After the news was over, the other inmates, excepting Garcia, left the TV room.

9. While Garcia and Cohen were alone, Garcia violently struck Cohen in the back of his head with a steel folding chair.

10. Cohen was rendered unconscious, and prison officials found him lying on the floor of the television viewing room shortly after 7:00 P.M.

11. Cohen immediately was transferred to Wayne County Memorial Hospital for medical treatment and, thereafter, in view of his serious injuries, was transferred to St. Joseph's Hospital in Savannah, Georgia.

12. Cohen initially was diagnosed as having suffered a skull fracture and a subdural hematoma.

13. Cohen underwent brain surgery at St. Joseph's Hospital, and remained hospitalized for approximately three weeks.

14. Cohen has suffered other injuries as a result of the subdural hematoma, including a permanent loss of taste and smell, memory loss, a lack of ability to concentrate, vertigo, and severe headaches. He is totally and permanently disabled. He was sixty-two years of age at the time of the assault, with a life expectancy of approximately fifteen years.

15. Garcia, at the time of the assault was a thirty-four year old, virile, person. He was serving a lengthy sentence for possession with intent to distribute cocaine.

16. On November 29, 1990, Garcia was designated to FCI Jesup Prison Camp. Garcia was thirty-two years of age when he began serving his sentence and thirty-four years of age at the time of the assault.

17. The designation of inmates to security classification levels is governed by the procedures outlined in the Bureau of Prisons Security Designation and Custody Classification Manual. Security Designation Manual Policy Statement 5100.02 was in effect in 1990, at the time that Garcia was designated.

18. The security level Designation Procedures are as follows. First, the Clerk of Court sends the judgment in a criminal case to the United States Marshal's Office once sentencing is completed. The Marshal then assigns an eight digit inmate identification number. The Marshal also compiles copies of the Presentencing Report, prepared by the United States Probation Office, the FBI "rap sheet," the judgment and commitment order, and the Marshal's custodial record.

19. Second, the Marshal forwards these documents to the appropriate Community Corrections Manager at the Bureau of Prisons, and requests a designation.

20. Third, the Community Corrections Manager enters information into a computerized tracking system known as SENTRY, and a Security Designation Form is generated. The Security Designation Form contains a summary of any detainers or pending charges on file, the nature of the current offense, the expected length of incarceration, prior commitments, a history of escapes or attempted escapes, a history of violence as shown only by prior convictions, pre-commitment status, public safety factors, and judicial recommendations. It must contain prior convictions.

21. Fourth, the Regional Designator designates an institution based on the information contained in the Security Designation Form that is obtained from SENTRY, as well as Central Information and Management Variables, such as an inmate's age, sentence limitations, inmate monitoring concerns, the racial balance and overcrowding at a particular institution, and an inmate's prior arrests. The Regional Designator does not have access to the Presentence Report, the FBI "rap sheet," nor the judgment and commitment order. Nor does he have access to the prior arrest record of the inmate. The Regional Designator tallies a "score" based on the information contained in the Security Designation Form. The Regional Designator is permitted to deviate from the security level that corresponds with the score, and assign an inmate to a higher security level, but not a lower one.

22. The Security Designation Form for Garcia indicated that he was convicted of a moderate security level offense, with no history of escape.

23. Garcia was designated by Regional Designator Judy Parks as a Minimum Security Level inmate with "out custody," who was eligible for prison camp placement.

24. An inmate with "out custody" is assigned to less secure housing and is eligible for work details outside the

institution's perimeter, so long as he is escorted by prison officials.

25. In designating Garcia, Parks did not have the benefit of the information disclosing Garcia's prior felony convictions or arrest record.

26. Next, as previously stated, Garcia has numerous prior arrests that were not factored into a Security Level Designation. Those arrests were included in his presentencing report. Between 1978 and 1 984, Garcia was arrested ten different times, including arrests for loitering, carrying a concealed firearm, possession of a machine gun, dealing in stolen property, possession and sale of various illegal drugs, conspiracy, aggravated assault, resisting arrest, forgery, grand larceny, homicide, and aggravated battery.

27. The Court concludes that Garcia's record demonstrates that he was a violent person and the Court so finds.

28. Garcia's prior convictions were not included in Security Designation Form required by the Bureau of Prison Regulations.

29. Cohen was designated as a Minimum Security Level I inmate with ii community custody," who is eligible for prison camp placement.

30. An inmate with ~ custody," is assigned to the least secure housing, is eligible for work details outside of the institution perimeters, with minimal supervision.

31. The Bureau of Prisons failed to follow its own Security Designation Manual Policy Statement 5100.02, which was in effect at the time Garcia's institution of confinement was designated. The Community Corrections Manager failed to follow the BOP regulations.

32. If the Community Corrections Manager had included Garcia's two prior convictions and lengthy arrest record showing a high propensity for violence in the Security Designation Form, the Regional Designator would have assigned Garcia to a higher level security institution.

33. The failure of the BOP personnel to follow the BOP regulations and policies was the proximate cause of Cohen's injuries and damages.

34. Cohen's injuries are severe and permanent. He has permanently lost his sense of smell and his sense of taste. He also suffers substantial physical and mental pain and suffering.

35. Cohen failed to establish any loss of future earnings with reasonable certainty, although his ability to work and labor has been destroyed because of his physical impairments.

36. Cohen's damages are $250,000.

CONCLUSIONS OF LAW

The Court has jurisdiction of this claim pursuant to the Federal Tort Claims Act ("FTCA"), which is codified in Sections 1346(b) and 2671 of Title 28 of the United States Code. The Act provides a general waiver of the sovereign immunity of the United States and allows private rights of action against the United States and its agencies for specified torts committed by federal government employees. In other words, the FTCA allows suits against the federal government as if those suits were filed against a private individual.

Pursuant to Section 2674, the United States "shall be liable, respecting the provisions of [the Act] relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." With very few exceptions that are not applicable in Cohen's case, the Act provides the exclusive

remedy for the injuries that Cohen claims to have suffered as a result of the alleged acts of employees at FCI Jesup.

The Act is limited by its terms, and private rights of action may be asserted against the United States only if specifically authorized by the Act. Pursuant to Section 1 346, a private plaintiff may bring suit for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Cohen exhausted his administrative remedies as required by Section 2675.

While the Act provides a general waiver of sovereign immunity, the Act also contains several exceptions that expressly disallow private rights of action against the United States.

Section 2680 of the Act outlines those exceptions, including the "discretionary function" exception that is codified at Section 2680(a). This Section of the Act expressly forbids private rights of action for "[any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The Court concludes as a matter of law, over objection by the United States, that subject matter jurisdiction over this matter is proper and that the discretionary function exception does not apply to the facts of this case for the reasons set forth in prior Orders of this Court disposing of motions to dismiss. Accordingly, the Court concludes that Cohen's action is properly before this Court.

The Court also concludes as a matter of law that the duty owed to Cohen while incarcerated at FCI Jesup is governed by both statute and regulation. Section 4042 of Title 1 8 of the United States Code establishes that the Bureau of Prisons owes a duty of care to inmates entrusted to that agency.

That section states that the Bureau of Prisons, under the direction of the Attorney General shall "provide suitable quarters and provide for the safekeeping care, and subsistence of all persons charged with or convicted of offenses against the United States." (emphasis supplied)

Section 4042(3) states that the Bureau of Prisons shall "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States."

Accordingly, the Court concludes as a matter of law that the Bureau of Prisons, acting through FCI Jesup employees, owed a non-discretionary, statutory duty of safekeeping, care, and protection of Cohen during his stay at that federal facility.

Additionally, the Security Designation Manual Policy Statement 1500.02, in combination with Section 3621(b) of Title 18 of the United States Code, govern the placement of inmates within federal correctional institutions and allows limited discretion to the federal employees tasked with placing federal inmates.

Section 3621(b) states that the Bureau of Prisons shall designate the place of a prisoner's confinement based upon (1) the resources of the facility, (2) the nature and circumstances of the offense, (3) the history and characteristics of the prisoner (4) any statement by the sentencing court, and (5) any pertinent policy statement issued by the Sentencing Commission.

Pursuant to Section 2674 of the Act, state substantive law applies concerning whether Cohen has stated a proper claim for relief.

The Court concludes as a matter of law that the negligence laws of the State of Georgia apply to the facts of this case.

Pursuant to the laws of Georgia, Cohen must establish four elements in order to prevail on his negligence claim against the United States. Cohen must establish that the Bureau of Prisons and FCI Jesup employees had a legal duty to protect him from unreasonable risks of harm, that such duty was breached, that there was a causal connection between that breach and his injuries, and that his loss, damage, or injury was proximately caused by Defendant's breach of the duty owed.

In order to recover for his claimed injuries, Cohen also is legally required to establish that the United States had some degree of notice of Garcia's propensity for violence before the Government may be held liable for the assault upon Cohen.

The Court concludes that the employees of the Bureau of Prisons failed to follow its own regulations in that the Community Correction Manager failed to include in the Security Designation Form the prior felony convictions of Garcia. If such convictions had been entered, and Garcia's lengthy arrest record considered, the officer charged with designating the corrections facility would have assigned Garcia to a higher level security institution than the Jesup Camp facility.

The Court concludes as a matter of law that Cohen has proven his right to recover under the negligence law of Georgia, and that the United States did have notice of Garcia's propensity for violence. The Court further concludes that Defendant failed to protect adequately Cohen from the attack by Garcia.

In coming to these conclusions, the Court has considered the two part test required to be used in order to determine whether challenged governmental conduct falls within the discretionary function exception. First, a determination must be made whether the challenged conduct involved an element of choice of judgment. The relevant inquiry is whether a controlling statute or regulation

mandates that a government agent perform his or her function in a specific function.

A determination must be made whether the choice or judgment made by the government official is of the kind that the discretionary function was designed to shield. In this case, as previously stated, the BOP failed to follow its own regulations mandating that its agents perform their functions in a specific manner.

Accordingly, the Court finds as a matter of fact and concludes as a matter of law that Cohen is entitled to a judgment in the sum of Two Hundred Fifty Thousand ($250,000) Dollars against the Defendant.

The Clerk is directed to enter an appropriate judgment in accordance with the findings and conclusions.

SO ORDERED, this 15th day of May, 1997.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

AO 450 (Rev. 5/85) Judgment in a Civil Action

United States District Court

Southern District of Georgia

WILLIAM COHEN

JUDGMENT IN A CIVIL CASE
CASE NUMBER CV294-179

V

UNITED STATES OF AMERICA

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court**. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that in accordance with the Findings of Fact and Conclusions of Law entered by the Court on May 15, 1997 finding that the Plaintiff is entitled to a judgment; judgment is hereby entered in favor of the Plaintiff, WILLIAM COHEN, and against the Defendant, UNITED STATES OF AMERICA, in the amount of TWO HUNDRED FIFTY THOUSAND DOLLARS AND ZERO CENTS ($250,000.00), and that the Plaintiff does have and recover his costs of Court, in his behalf expended, such costs to be taxed by the Clerk.

Approved: /s/ Anthony A. Alaimo

Judge, U.S. District Court

May 15, 1997
Date

Henry R. Crumley, Jr.
Clerk

/s/ Sherry Taylor
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM COHEN, CIVIL ACTION

Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant. NO. CV294-179

ORDER

William Cohen, a former inmate at the Federal Correctional Institution in Jesup, Georgia ("FCI Jesup"), brings this action, pro se under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346; 2671, et seq., for injuries resulting from an assault upon him by another inmate.

Cohen claims that the Government failed to protect him from foreseeable assault and failed to follow proper procedures in assigning his assailant to a minimum security prison camp rather than to a properly supervised institution.

Before the Court is the Government's Motion to Dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Government contends that the Court lacks subject matter jurisdiction over this matter because it falls within the discretionary function exception to the FTCA. As discussed below, the Government's motion will be **DENIED.**

FACTS

In 1991, William Cohen was sentenced to eighteen months in prison for infringement of copyright laws and trafficking in counterfeit labels. After reviewing Cohen's file, prison officials rated Cohen as a "minimum" security inmate with "community" custody. As a result of these ratings, prison officials designated

Cohen to FCI Jesup Prison Camp, a "minimum" security facility for inmates with "community" custody or "out" custody.

On February 8, 1992, Cohen was watching television in the television room at FCI Jesup. Cohen and another inmate, Humberto Garcia, began arguing about changing the channel. Garcia then attacked Cohen and struck him in the head with a metal folding chair. No one witnessed the incident. At the time of the attack, Cohen was sixty years old. Garcia was thirty-three.

Shortly after 7:00 P.M., prison officials found Cohen unconscious on the floor of the television room. He was bleeding from his ears and mouth. After prison health providers examined Cohen, they transferred him to Wayne County Memorial Hospital where he was diagnosed as having a possible skull fracture and a subdural hematoma. Cohen later underwent brain surgery at St. Joseph's Hospital in Savannah, Georgia.

According to his complaint, Cohen suffers permanent injuries including a loss of sense of smell and taste, headaches, memory loss, lack of concentration, and general weakness. He also contends that he will never be able to maintain gainful employment.

At the time of the incident, Garcia was serving a five to forty year sentence for possession of cocaine with intent to distribute. He had been an inmate at FCI Jesup since November of 1990, when prison officials rated him as a "security level one" inmate with "out" custody.

Garcia received a "security level one" rating despite his previous convictions and extensive arrest record. Over the span of several years, Garcia was arrested for burglary, loitering, carrying a concealed firearm, possession of quaaludes, aggravated assault on a police officer, possession of cocaine, intimidation of a public officer, possession of a machine gun and attempted murder. None of these arrests resulted in a conviction. Garcia did have prior convictions for conspiracy to commit a felony, carrying a concealed firearm, and resisting arrest without violence.

Cohen contends that the Government failed to follow its own procedures in rating Garcia as a "security level one" inmate and designating him to a "minimum" security facility. Cohen also argues that prison officials failed to supervise Garcia so as to protect Cohen from a foreseeable attack.

After the attack, prison officials transferred Garcia to a prison facility with higher security standards than FCI Jesup.

PROCEDURAL BACKGROUND

On March 20, 1995, the Government filed a motion for summary judgment contending that it was not negligent as a matter of law. The Court denied the motion after finding that genuine issues of material fact remained as to whether the Government was negligent.

On May 23, 1995, the Government filed the present motion to dismiss, contending that the Court lacks subject matter jurisdiction over this case because it falls within the discretionary function exception to the FTCA.

DISCUSSION

I. Motion to Dismiss under 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a complaint on the ground that the Court lacks subject matter jurisdiction. A 12(b)(1) motion can take either of two forms. A "facial attack" on the complaint requires the court to assess whether the plaintiff has alleged a sufficient basis of subject matter jurisdiction. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (citing Menchaca v. Chrysler Credit Corp. 613 F.2d 507, 511 (5th Cir.), cert. denied, 449 U.S. 953 (1980)). For purposes of a "facial attack," the allegations in the complaint are taken as true. Lawrence, 919 F.2d at 1529.

The second type of 12(b)(1) motion is a "factual attack," which challenges the court's subject matter jurisdiction "in fact."

Id. In evaluating a "factual attack," the Court may consider matters outside the pleadings, and "no presumptive truthfulness attaches to plaintiff's allegations." Id. Furthermore, "the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Id.

Here, the Government asserts the FTCA's discretionary function exception, thereby requiring a factual inquiry as to whether this exception indeed applies. Accordingly, the Court will consider materials outside of the pleadings, and "no presumptive truthfulness" will attach to Cohen's allegations. Id. If the discretionary function exception applies, the case must be dismissed for lack of subject matter jurisdiction. Williams v. United States, 50 F.3d 299, 3C5 (4th Cr. 1995).

II. Discretionary Function Exception to the FTCA

The United States may not be sued unless it waives sovereign immunity. The FTCA constitutes such a waiver by providing a cause of action against the United States for plaintiffs injured by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1976). The FTCA's waiver of sovereign immunity is limited, however, by the discretionary function exception which precludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

In determining whether the discretionary function exception applies, the Court conducts a two-part test. First, the Court must determine whether the decision at issue is discretionary. Berkovitz v. United States, 486 U.S. 531, 536 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988) If the decision is discretionary the Court must then determine whether the decision involves consideration of social, economic or political policies. Id. If both tests are satisfied, the discretionary function exception applies. In conducting the two-part test, the Court should focus on the "nature of the conduct," rather than the status of the government actor. United States v. S.A. Empresa de Viacao Aerea

Rio Grandense (Varig Airlines), 467 U.S. 797, 813, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984).

A. Is the Decision Discretionary?

A particular decision is discretionary if it involves an "element of judgment or choice." Berkovitz, 486 U.S. at 536. The discretion referred to is "the discretion of the executive or the administrator to act according to one's judgment of the best course . . .." Dalehite v. United States, 346 U.S. 1 5, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953). Accordingly, a decision is not discretionary if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." Berkovitz, 486 U.S. at 536. As the Supreme Court has noted, "if an employee violates the mandatory regulation] there will be no shelter from liability because there is no room for choice." United States v. Gaubert, 499 U.S. 315, 324, 111 S.Ct. 1267, 1274, 113 L.Ed.2d 335 (1991).

For a regulation or policy to be considered mandatory, however, it must constitute a "specific mandatory directive," such that "those charged with [the regulation's) implementation are not afforded wide latitude regarding its execution." Berkovitz, 486 U.S. at 544.

B. Is the Discretionary Decision Grounded in Social, Economic or Political Policy?

If the decision involved is indeed discretionary, the Court must then decide whether the choice or judgment is of the kind that Congress intended to shield from tort liability. Varig Airlines, 467 U.S. at 813. In this regard, the discretionary function is designed to shield "legislative and administrative decisions grounded in social, economic, and political policy." Id. at 814. "The presumption under the law is that when exercising discretion accorded to it, the government's actions will be grounded in policy." Kirchmann v. United States, 8 F.3d 1273, 1277 (8th Cir.

1993). As the Fourth Circuit has noted, a decision is grounded in policy if the government employee's "judgment or choice advances the purposes of a regulatory scheme that gives an employee such discretion." Williams 50 F.3d at 309.

III. Prison Officials' Decision to Designate Garcia to FCI Jesup Prison Camp

Cohen contends that the Government failed to follow its own procedures in assigning Garcia to a minimum security facility. The Government argues that designation of inmates to particular facilities within the federal prison system is protected by the discretionary function exception to the FTCA.

Generally, "[t]he discretionary exception to the FTCA bars any recovery predicated on the classification of inmates." Bailor v. Salvation Army, 854 F. Supp. 1341, 1366 (N.D. Ind. 1994)(quoting Reed v. Hadden, 473 F. Supp. 658, 660 (D. Colo. 1979)), aff'd, 51 F.3d 678 (7th Cir. 1995). Indeed, the Bureau of Prisons is granted discretion in designating inmates to particular institutions. See e.g. 18 U.S.C. § 3621(b).

Nonetheless, prison officials do not have discretion to ignore the required steps of the decision-making process. Bailor, 854 F. Supp. at 1 366 (citing Payton v. United States, 679 F.2d 475, 481 (5th Cir. 1982)). Furthermore, if a policy or regulation specifically prescribes a course of action," then the discretionary function exception does not apply, for the prison official "has no rightful option but to adhere to the directive." Berkovitz, 486 U.S. at 536. Accordingly, when evaluating the propriety of the discretionary function exception, the district court must consider any policies or regulations which govern the decision at issue. See, e.g., Valdez v. United States, 56 F.3d 1177 (9th Cir. 1995)(court examined National Park Service Guidelines); Sanchez v. Bellefeuille, 855 F. Supp. 587 (N.D.N.Y. 1994)(court examined Border Patrol handbook); Bailor, 854 F. Supp. at 1367 (court examined prison Program Statements).

The designation of prisoners to particular institutions is governed by the "Security Designation and Custody Classification

Manual, Program Statement 5100.05" ("Program Statement"). The Program Statement provides detailed, step-by-step procedures for designating inmates to various federal prison facilities. Some of these procedures constitute "specific mandatory directives" such that prison officials have no choice but to adhere to them. For example, prison officials "shall complete . . . a Security Designation Form on all cases with terms exceeding thirty days." (Program Statement, Chap. 4, p. 2)(emphasis added) The Program Statement also dictates specific, "required" information that must be included on the Security Designation Form such as "any history of incarceration, violence, or escape." (Program Statement, Chap. 4, p.2) Furthermore, affidavits submitted by the Government indicate that particular portions of the designation process are rather mechanical and non-discretionary: "[Garcia] 'scored out' as being appropriate for a satellite camp designation." (Binion Aff. ¶ 5)(emphasis added)

Other aspects of the designation process, however, require the exercise of discretion. For example, prison officials must use their best judgment in deciding whether an inmate's designation should be affected by certain "overriding reasons such as Sentence Limitations, Management Variables or Public Safety Factors. (Program Statement, Chap. 4, p.3).

Accordingly, while the discretionary function exception may apply to some procedures in the Program Statement, it does not apply to other procedures. At the present time, the record is unclear as to which provisions of the Program Statement Cohen contends were violated. Thus, dismissal of Cohen's complaint is premature.

As the Supreme Court has noted, allegations contained in a pro se complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers Haines v. Kerner, 404 U.S. 519,520,92 S.Ct. 594,30 L.Ed.2d 652(1972). Under this standard, dismissal is inappropriate.

IV. Prison Officials' Failure to Protect Cohen

Cohen contends that the Government was negligent in failing to protect him from Garcia when it knew of Garcia's violent propensities. Again, the Government argues that the discretionary function exception bars Cohen's claim.

The discretionary function exception does not apply to claims such as this. United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); Cohen v. United States, 252 F. Supp. 679, 687 (N.D. Ga. 1966), rev'd on other grounds, 389 F.2d 689 (5th Cr. 1967). In United State v. Muniz, the Supreme Court held that an action may be maintained under the FTCA for personal injuries sustained by a federal prisoner as a result of the negligent acts or omissions of government employees. Muniz, 374 U.S. at 1 52. In Cohen v. United States, the court adhered to this principle by refusing to apply the discretionary function exception to a federal prisoner's FTCA claim based upon assault by another inmate:

"Whatever is done or not done at any institution involves a decision by someone, but this does not mean that all acts are exempt from tortious liability as discretionary." Cohen, 252 F. Supp. at 687. As stated in the Court's previous order, "[in prisoner assault cases, the proper inquiry is 'whether [the] assault on [the plaintiff] was a danger that was apparent or should have been apparent to prison officials on the basis of the information then available to them.'" Order, Apr. 28, 1995 at 7 (Dkt. # 9)(quoting Cowart v. United States, 617 F.2d 112, 11 6 (5th Cir. 1980)).

CONCLUSION

For the reasons stated above, the Government's Motion to Dismiss (Dkt. # 13) is **DENIED.**

SO ORDERED, this 21st day of July, 1995.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

WILLIAM COHEN, CIVIL ACTION

Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant. NO. CV294-179

ORDER

William Cohen, a former inmate at the Federal Correctional Institution in Jesup, Georgia ("FCI Jesup"), brings this action, pro se, under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346; 2671 et sea., for injuries resulting from an assault upon him by another inmate, Humberto Garcia. Cohen claims that the Government, as it acted through the Federal Bureau of Prisons ("BOP"), failed to protect him from foreseeable assault and failed to follow proper procedures by assigning his assailant to a minimum security prison camp, rather than to a properly supervised institution.

Before the Court is the Government's Renewed Motion to Dismiss or, in the alternative, for Summary Judgment. In this motion, the Government contends that Cohen's claim relating to the improper assignment of his assailant is barred by the discretionary function exception to FTCA. This issue has already been discussed by the Court in two previous orders. (See Court's Orders of April 28, 1995 and July 21, 1995). For the reasons stated below, this renewed motion will be DENIED.

In the Order of July 21, 1995 the Court stated:

> Generally, "[t]he discretionary exception to the FTCA bars any recovery predicated on the classification of inmates." Bailor v. Salvation Army, 854 F. Supp. 1 341, 1 366 (N.D. Ind. 1 994)(quoting Reed v. Hadden, 473 F. Supp. 658, 660 (D. Coo. 1979)), aff'd, 51 F.3d 678 (7th Cir. 1995). Indeed, the Bureau of Prisons is granted discretion in designating inmates to particular institutions. See, e.g., 18 U.S.C. § 3621(b).
>
> Nonetheless, prison officials do not have discretion to ignore the required steps of the decision-making process. Bailor, 854 F. Supp. at 1366 (citing Payton v. United States, 679 F.2d 475, 481 (5th Cir. 1982)). Furthermore, if a policy or regulation "specifically prescribes a course of action," then the discretionary function exception does not apply, for the prison official "has no rightful option but to adhere to the directive." Berkovitz, 486 U.S. at 536.

(Order p.8).

At the time of the Court's previous order, the correctness of BOP's actions was not clear. Insufficient information was presented and the Court was unable to determine if BOP complied with Program Statement 5100.2, a policy statement which detailed the manner for designating the security level for federal inmates. As the Court stated at the time, BOP cannot meet the requirements of the discretionary function exception if its actions did not comply with its own policy and regulatory guidelines. Bailor, 854 F. Supp. at 1 366 (citing Payton v. United States, 679 F.2d 475, 481(5th Cir. 1982)).

The Government's present motion provides the Court with additional information. A blank inmate load and security designation form and instructions, which are used to calculate the security level of an inmate, have been provided to the Court. (Def. Ex. 1, Attach. A, Sec. 8-9). Affidavits by BOP employees have also been provided in an attempt to explain the security designation form. (See Det. Ex. 1, 2). While this information is helpful, it does not provide a sufficient basis for the Court to conclude that BOP complied with the requirements of Program Statement 5100.2.

The Court has not been provided with a completed inmate load and security form detailing the characteristics of Cohen's attacker, Garcia. In addition, the Court has not been provided with sufficient information to recreate this form. The Court is also troubled by the fact that BOP officials have stated under oath that Cohen's attacker had no previous convictions, while information provided by Cohen indicates that Garcia had at least one conviction. (See Def. Ex. 1 ¶ 16, Def. Ex. 2 ¶ 4, and Pl. Ex. 2 p.5).

CONCLUSION

Under these circumstances, the Court cannot conclude that the BOP fully complied with its own policies and regulations. Allegations contained in a pro se complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers. . ." Haines v. Kerner, 404 U.S. 519, 520 (1972). As such, the Government's motion to dismiss or, in the alternative, for summary judgment is **DENIED.**

SO ORDERED, this 6th day of February, 1996.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES' DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8737.

William COHEN,
Plaintiff-Appellee, Cross-Appellant,
v.
UNITED STATES of America,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Georgia
Aug. 26, 1998.

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

CARNES, Circuit Judge:

While incarcerated in a minimum security federal prison, plaintiff William Cohen was injured when he was attacked by another prisoner. He sued the United States under the Federal Tort Claims Act asserting that the Bureau of Prisons had negligently assigned his attacker to a minimum security prison. After a bench trial, the district court entered judgment for Cohen and awarded him $250,000. Because we conclude that the discretionary function exception to the Federal Tort Claims Act shields the United States from liability in this case, we reverse that judgment.

I. BACKGROUND

In 1991, Cohen was sentenced to eighteen months in prison for copyright violations. The Bureau of Prisons ("BOP") classified him as "security level 1," the lowest security classification in the federal correction system, and it placed him in the minimum security Community Corrections Center at the Jesup, Georgia

Federal Corrections Institution. On February 8, 1992, Cohen was watching television in a common area of the prison. When Humberto Garcia, one of the other inmates, changed the channel, Cohen objected and changed the television back to its original channel. Later, after all the other inmates had left the room, Garcia picked up a metal chair and repeatedly beat Cohen on the head. As a result of Garcia's attack, Cohen underwent neurological surgery and spent three weeks in the hospital. Since his hospitalization, Cohen is unable to walk normally, suffers from severe headaches, has permanent short- term memory problems, and has lost his sense of taste and smell. After exhausting his administrative remedies, Cohen filed a claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., alleging that the government's negligence was responsible for his injuries. After a bench trial, the district court entered judgment in favor of Cohen, rejecting the government's arguments (1) that the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a) barred Cohen's FTCA claim and therefore deprived the district court of jurisdiction, and (2) that the BOP had not been negligent. The court awarded Cohen $250,000 in damages.

The United States appeals, challenging the district court's legal conclusion that the discretionary function exception did not apply, and its factual finding that the BOP was negligent. Cohen cross-appeals, seeking increased damages.

II. STANDARD OF REVIEW

We review a district court's legal conclusion de novo and its fact findings for clear error. See, *e.g.*, *Lykes Bros., Inc. v. United States Army Corps of Eng'rs*, 64 F.3d 630, 634 (11th Cir.1995). Whether the United States is entitled to application of the discretionary function exception to the FTCA is a question of law we review de novo. See *Ochran v. United States*, 117 F.3d 495, 499-500 (11th Cir.1997).

III. DISCUSSION

Cohen's theory of liability is that the BOP was negligent in classifying Garcia as "security level 1," the lowest security classification in the federal correction system, and placing him at the minimum security Jesup institution. According to Cohen, had Garcia been assigned a higher security level as allegedly warranted by his criminal history, Garcia's attack and Cohen's injuries would not have occurred. The Government contends that it cannot be held liable for any alleged negligence in determining Garcia's custody classification because the prisoner custody classification process performed by the BOP falls within the FTCA's discretionary function exception, 28 U.S.C. § 2680(a). Cohen first responds that the discretionary function exception does not apply to the BOP's classification of prisoners because 18 U.S.C. § 4042 establishes a non-discretionary duty of care on the part of the BOP toward prisoners which removes any discretion the BOP might otherwise have in this regard. In the alternative, Cohen argues that even if Congress did allow the BOP discretion in classifying prisoners, the BOP constrained its discretion in this regard by promulgating internal guidelines for its personnel to follow in classifying prisoners. According to Cohen, because BOP personnel did not follow those guidelines when they classified Garcia, the discretionary function exception does not apply in this case.

In addressing these contentions, we will begin by discussing the nature of the discretionary function exception and the prerequisites for its application. We will then discuss whether the BOP's classification of prisoners and placement of them in institutions meet those criteria. Finally, we will discuss whether the BOP failed to follow its own guidelines concerning the classification of prisoners with the result that the discretionary function exception is inapplicable in this case.

A. The Discretionary Function Exception

The FTCA "waives the United States government's sovereign immunity from suit in federal courts for the negligent actions of its employees." *Ochran*, 117 F.3d at 499. The FTCA waiver of immunity is subject to several exceptions. The

discretionary function exception, which is at issue in this case, precludes government liability for "[a]ny claim based upon ... the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If the discretionary function exception applies, the FTCA claim must be dismissed for lack of subject matter jurisdiction. See, *e.g.*, *Powers v. United States*, 996 F.2d 1121, 1126 (11th Cir.1993). The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984). Congress believed that imposing liability on the government for its employees' discretionary acts "would seriously handicap efficient governmental operations." *Id.* at 814, 104 S.Ct. at 2765 (internal citations and quotations omitted).

The Supreme Court has enunciated a two-part test for determining whether the discretionary function exception bars suit against the United States in a given case. See *Ochran*, 117 F.3d at 499. First, "we consider the nature of the conduct and determine whether it involves 'an element of judgment or choice.' " Id. (quoting *United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273, 113 L.Ed.2d 335 (1991)). "Government conduct does not involve an element of judgment or choice, and thus is not discretionary, if 'a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive.' " Id. (quoting *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273 (internal citations and quotations omitted)).

Second, "if the conduct at issue involves the exercise of judgment, we must determine whether that judgment is grounded in considerations of public policy." Id. "[T]he purpose of the exception is to prevent judicial second-guessing of legislative and

administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1273 (internal quotations and citations omitted). "In making this determination, we do not focus on the subjective intent of the government employee or inquire whether the employee actually weighed social, economic, and political policy considerations before acting." *Ochran*, 117 F.3d at 500. Instead, we "focus on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325, 111 S.Ct. at 1275.

B. Whether the BOP's Classification of Prisoners and Placement of Them in Institutions Involves Conduct or Decisions That Fall Within the Discretionary Function Exception

In determining whether the discretionary function exception applies in this case, we first address whether the BOP's decisions concerning classification of prisoners and what institution to place them in "involve an element of judgment or choice." *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273. Cohen contends that the BOP's decisions in this regard do not meet this first prong of the two-part discretionary function exception test. In support of his contention, Cohen points to 18 U.S.C. § 4042, which provides in relevant part that "[t]he Bureau of Prisons, under the direction of the Attorney General, shall ... provide for the safekeeping, care, and ... protection ... of all persons charged with or convicted of offenses against the United States." He contends that this language establishes a non-discretionary duty of care toward prisoners. In particular, Cohen argues that the § 4042 duty of care applies to the BOP's decisions concerning prisoner custody classification and thus removes cases, such as this one, where one prisoner assaults another, from the discretionary function exception. Under Cohen's theory, the BOP violated its § 4042 duty of care when it classified Garcia at the lowest security classification and placed him in the same minimum security institution as Cohen.

Cohen cites several decisions which he asserts support his contention that § 4042 imposes a non-discretionary duty of care on

BOP personnel and takes this case outside the discretionary function exception. However, we find those decisions neither controlling nor persuasive on this issue. First, Cohen cites the Supreme Court's decision in *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). In that case, the Supreme Court merely held that prisoners as a class were not barred from bringing claims under the FTCA. See id. at 158, 83 S.Ct. at 1855. However, the Court expressly reserved the issue of whether the discretionary function exception applies to cases in which prisoners allege that the BOP has negligently violated a duty of care. See *id.* at 163, 83 S.Ct. at 1858 (declining to "intimate any opinion upon [the] applicability" of the discretionary function exception to negligence claims brought by the prisoners in that case).

Next, Cohen cites a pair of former Fifth Circuit cases, *Jones v. United States*, 534 F.2d 53 (5th Cir.1976), and *Cowart v. United States*, 617 F.2d 112 (5th Cir.1980). In both *Jones* and *Cowart*, we simply affirmed the district court's finding that the BOP had not breached any duty of care owed to a prisoner who was attacked by another prisoner. See *Jones*, 534 F.2d at 55; *Cowart*, 617 F.2d at 119. Because we did not address the discretionary function exception, and did not find liability in Jones, that case cannot support Cohen's position that § 4042 establishes a non-discretionary duty that removes from the discretionary function exception cases in which prisoners in the care of the BOP are assaulted by another prisoner.

As for *Cowart*, although not essential to the holding, we did state that the discretionary function exception does not apply to cases in which a prisoner alleges negligence on the part of the BOP because "the actions of prison officials are at the 'operational level.' " *Cowart*, 617 F.2d at 116 n. 15. However, any weight that would otherwise attach to that dicta has been vitiated by the Supreme Court's subsequent decision in *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). The Supreme Court held in *Gaubert* that the mere fact a government official performs an action at the "operational level" (as opposed to the "planning level") does not remove that official's action from the discretionary

function exception for purposes of suits under the FTCA. See *id.* at 325, 111 S.Ct. at 1275. Where one of our prior panel opinions conflicts with a later Supreme Court decision, we are compelled to follow the Supreme Court's decision. See, *e.g.*, *Gianelli Money Purchase Plan and Trust v. ADM Investor Serv., Inc.*, 146 F.3d 1309 (11th Cir.1998); *Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir.1996). We do so here.

Finally, Cohen cites the Third Circuit's decision in *Jones v. United States*, 91 F.3d 623 (3d Cir.1996). In that case, a prisoner alleged that the BOP, by withholding his medication, had breached the § 4042 duty of care to protect him. The Third Circuit held that those allegations were sufficient to avoid summary judgment. See *id.* at 625. However, because the panel in that case did not even discuss the discretionary function exception, that case does not persuade us to adopt Cohen's proposition that § 4042 establishes a non- discretionary duty that makes the discretionary function exception inapplicable in cases, such as Cohen's, where a prisoner is attacked by another prisoner.

Furthermore, even if § 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception. We believe our conclusion in this regard is mandated by our holding in *Ochran v. United States*, 117 F.3d 495 (11th Cir.1997), and is buttressed by the Seventh Circuit's decision in *Calderon v. United States*, 123 F.3d 947 (7th Cir.1997). In *Ochran*, a witness in a federal drug trial was harmed by the drug defendant, allegedly due to the failure of the United States Attorney to protect her. The plaintiff argued that a regulation which required the United States Attorney to protect her created a non-discretionary duty, with the result that the discretionary function exception did not shield the United States from liability under the FTCA. Not unlike § 4042, the regulation at issue there stated that United States Attorneys "shall ... protect [witnesses] against ... harm ... from a suspect." *Ochran* 117 F.3d at 500. We nonetheless held in *Ochran* that the discretionary function exception did apply because the use of the language "shall

... protect" did not mean that the regulation "left no room for the [U.S. Attorney] to exercise judgment or choice" about how to protect witnesses. Id. at 500. Thus, *Ochran* stands for the proposition that even though a statute or regulation imposes a general duty on a government agency, the discretionary function exception may still apply if the agency retains sufficient discretion in fulfilling that duty. That is what we have in this case.

The Seventh Circuit's reasoning in *Calderon* also convinces us that § 4042 leaves BOP personnel sufficient discretion about how their § 4042 duty of care is to be accomplished to warrant application of the discretionary function exception. Calderon rejected the argument that the general duty to protect prisoners set forth in § 4042 prevents the Government from invoking the discretionary function exception in an FTCA case arising from a prisoner-on-prisoner attack. The Seventh Circuit reasoned persuasively that "[w]hile it is true that [§ 4042] sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates." *Calderon* 123 F.3d at 950. We agree.

Thus Cohen's reliance on § 4042 is misplaced. As the Seventh Circuit explained, for such an "argument to be effective, [the plaintiff] must demonstrate that § 4042 sets forth nondiscretionary actions which BOP personnel were required to undertake to protect [him]." *Id.* Section 4042 does not set forth any required nondiscretionary actions. Therefore, we reject Cohen's argument that § 4042 imposes a non-discretionary duty of care on the BOP which removes this case from the discretionary function exception.

Nor does any other statutory provision impose a non-discretionary duty of care on the BOP in classifying prisoners and placing them in institutions. To the contrary, two statutory provisions give the BOP discretion in this regard. The first of these is 18 U.S.C § 4081, which provides in relevant part that prisoners

should be classified:

> according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to [Federal penal and correctional] institutions.

18 U.S.C. § 4081. The second provision, 18 U.S.C. § 3621, provides in relevant part that the BOP:

> shall designate the place of the prisoner's imprisonment. The [BOP] may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the [BOP] ... that the [BOP] determines to be appropriate and suitable, considering--
>
> (1) the resources of the facility contemplated;
>
> (2) the nature and circumstances of the offense;
>
> (3) the history and characteristics of the prisoner;
>
> (4) any statement by the court that imposed the sentence--
>
> (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
>
> (B) recommending a type of penal or correctional facility as appropriate; and
>
> (5) any pertinent policy issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 U.S.C. § 3621(b).

These statutory provisions do not mandate a specific, non-discretionary course of conduct for the BOP to follow in classifying prisoners and placing them in a particular institution. Instead, they give the BOP ample room for judgment by listing a non-exhaustive set of factors for the BOP to consider and leaving to the BOP what weight to assign to any particular factor. In particular, the language granting the BOP authority to "designate any available penal or correctional facility ... that the [BOP] determines to be appropriate and suitable," 18 U.S.C. § 3621(b), is indicative of Congress' intent to allow the BOP to rely on its own judgment in classifying prisoners and placing them in institutions. Our conclusion that Congress intended to give the BOP discretion in making its classification decisions and determinations about

placement of prisoners is reinforced by the Senate Report accompanying the legislation that became 18 U.S.C. § 3621. That report provides in pertinent part:

> The Committee, by listing factors for the [BOP] to consider in determining the appropriateness or suitability of any available facility, does not intend to restrict or limit the [BOP] in the exercise of its existing discretion so long as the facility meets the minimum standards of health and habitability of the [BOP], but intends simply to set forth the appropriate factors that the [BOP] should consider in making the designations.

S.Rep. No. 98-225, 98th Cong., 2d Sess. 142, reprinted in 1984 U.S.Code Cong. & Admin. News 3182, 3325. Accordingly, the first part of the two-part discretionary function exception test, the element of judgment or choice prong, is satisfied in this case.

We turn now to the second prong, which requires that we determine whether the judgment or discretion the BOP exercises in this regard is the type of discretion which the discretionary function exception is intended to protect. More specifically, we must decide whether the nature of the decision or conduct at issue is "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325, 111 S.Ct. at 1275. As the Supreme Court noted in *Gaubert*, we presume that actions or decisions are "grounded in [public] policy" in cases where the statute allows government officials to exercise discretion. *Id.* at 324, 111 S.Ct. at 1274. Deciding how to classify prisoners and choosing the institution in which to place them are part and parcel of the inherently policy-laden endeavor of maintaining order and preserving security within our nation's prisons. See *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979) ("Prison administrators ... should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

This case exemplifies the type of case Congress must have had in mind when it enacted the discretionary function exception.

Under Cohen's theory, anytime a prisoner is injured by another prisoner, he can bring an action claiming that the BOP was negligent in classifying the prisoner who committed the assault and placing him in the institution at which the attack occurred, or in not removing that prisoner based upon some prior incident, or in not restricting his movement, or in not providing more guards, and so forth. Such second-guessing of the BOP's discretionary decisions is the type of thing avoided by the discretionary function exception, which is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1273 (internal citations and quotations omitted).

Accordingly, we conclude that the BOP's actions in classifying prisoners and placing them in institutions involve conduct or decisions that meet both prerequisites for application of the discretionary function exception.

C. Whether the Alleged Failure of the BOP to Follow Its Own Guidelines Concerning the Classification of Prisoners Renders the Discretionary Function Exception Inapplicable

Cohen argues that even if Congress gave the BOP discretion in classifying prisoners and placing them in institutions, the BOP constrained its discretion in this regard by promulgating internal guidelines set forth in Program Statement 5100.2 (the "Program Statement"). According to Cohen, because BOP personnel violated provisions of the Program Statement when they classified Garcia as suitable for the lowest security classification level and placed him at the minimum security Jesup institution, the discretionary function exception does not apply in this case. The district court found that the BOP failed to adhere to the Program Statement when its employees improperly filled out a "security designation form" as part of the process of determining Garcia's custody classification.

Where Congress has granted an agency discretion in

implementing a regulatory statute, the agency's promulgation of regulations or guidelines describing how it will use that discretion is protected by the discretionary function exception. See *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1274. Furthermore, if the regulation or guideline "mandates particular conduct, and the [agency's] employee obeys the direction, the Government will be protected [by the discretionary function exception] because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation [or guideline.]" *Id.* at 324, 111 S.Ct. at 1274. On the other hand, "[i]f the employee violates the mandatory regulation [or guideline], there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *Id.*

As we have discussed, Congress has given the BOP discretion in classifying prisoners and placing them in institutions. Accordingly, under *Gaubert*, the BOP's guidelines, as set forth in the Program Statement, and the actions of BOP personnel consistent with those guidelines are insulated by the discretionary function exception. The issue we must address is whether the district court correctly found that the BOP personnel failed to follow the guidelines in the Program Statement when they filled out Garcia's security designation form. We conclude that the district court clearly erred in reaching that conclusion.

The district court found that BOP personnel failed to follow the Program Statement guidelines in filling out Garcia's security designation form because they did not include Garcia's two prior felony convictions on that form. Garcia's two prior convictions, neither of which resulted in incarceration, were for (1) possession and sale of cocaine and (2) possession of cocaine, possession of a firearm, and resisting arrest without violence. Although the district court did not specify where on the security designation form those convictions should have been listed, Cohen contends BOP personnel were required to include them under either the "Prior Commitment" or "History of Violence" sections of the form. We disagree.

The Program Statement explicitly states that only

convictions which resulted in confinement should be included in the Prior Commitment section. Because Garcia's two prior convictions did not result in confinement, they were properly omitted from that section. As for the History of Violence section, nothing in the Program Statement requires including in that section convictions of possession and sale of cocaine, possession of a firearm, or resisting arrest without violence. Thus the district court clearly erred in finding that BOP personnel incorrectly filled out Garcia's security designation form. Accordingly, Cohen's argument, which the district court accepted, that the discretionary function exception does not apply because the BOP failed to follow its own guidelines is without merit.

Cohen also claims that the BOP failed to follow the Program Statement when it classified Garcia at the lowest security level, because the Program Statement did not allow aliens to be classified at that level. This argument fails both because the district court did not find that Garcia was an alien, and because the Program Statement provides that the BOP's regional director retains the discretion to assign an alien to the lowest security level.

D. Summary

To sum up, we hold that (1) the BOP's actions in classifying prisoners and placing them in institutions involve conduct or decisions that fall within the discretionary function exception; (2) 18 U.S.C. § 4042 does not render the discretionary function exception inapplicable to cases, such as this one, in which a prisoner attacks another prisoner; and (3) because BOP personnel followed the guidelines in the Program Statement when they classified Garcia and placed him in the minimum security Jesup institution, those guidelines do not render the discretionary function exception inapplicable. Accordingly, that exception shields the United States from liability to Cohen under the FTCA, and the district court should have dismissed Cohen's FTCA claim for lack of subject matter jurisdiction. In light of our holding that Cohen's FTCA claim should have been dismissed, the Government's argument that it was not negligent and Cohen's cross-appeal

claiming he was entitled to increased damages are moot.

IV. CONCLUSION

The district court's judgment is REVERSED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8737

District Court No. CV294-179

WILLIAM COHEN,

Plaintiff-Appellee,
Cross-Appellant

versus

UNITED STATES OF AMERICA,

Defendant-Appellant,
Cross-Appellee

Appeals from the United States District Court
for the Southern District of Georgia

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and were argued by counsel;

UPON CONSDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby REVERSED;

It is further ordered that each party bear their own costs on appeal.

Entered: August 26, 1998
For the Court: Thomas K. Kahn, Clerk
By: /s/ Matt Davidson
Deputy Clerk

REISSUED AS MANDATE: NOV 30 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-8737

WILLIAM COHEN,

Plaintiff-Appellee,
Cross-Appellant

versus

UNITED STATES OF AMERICA,

Defendant-Appellant,
Cross-Appellee

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F2d ___)

Before: CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:
The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. O. Carnes
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 20 1998
THOMAS K. KAHN
CLERK

ORD-42
(6/95)

Full Text of Constitutional Provisions and Statutes Involved in the Present Case

Constitutional Provisions:

U. S. Constitution, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes:
(in numerical order by Title and Section)

18 USC §3521:

> (a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the

participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

18 USC §3621(b):

(a) The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 USC §4041:

The Bureau of Prisons shall be in charge of a director appointed by and serving directly under the Attorney General at a salary of $10,000 a year. The Attorney General may appoint such additional officers and employees as he deems necessary.

18 USC §4042(2):

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> > (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
> >
> > (3) . . .

18 USC §4081:

> The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

28 USC §501:

> The Department of Justice is an executive department of the United States at the seat of Government.

28 USC §503:

> The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.

28 USC §1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 USC §1346(b)(1):

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC §2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity,

temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 USC §2672:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal

agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 USC §2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 USC §2679(a):

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b)

of this title, and the remedies provided by this title in such cases shall be exclusive.

28 USC §2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

42 USC §1997e(a):

(a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Kansas Stat. Ann. 75-6104(e):

A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . .

(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved; . . .

[GOVERNMENT TRIAL EXHIBIT 4] Non-Guideline [_]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.) Docket No. 90-58-Cr-KING

Humberto Garcia) Defendant No 1

PRESENTENCE REPORT

Prepared for:
Honorable James Lawrence King
U.S. District Judge

Sentencing Date:
November 2, 1990

Prepared by:
Suzanne Ferreira-adm
U.S. Probation Officer

Office Location:
Miami, FL

Offense: Count 1: Possession With Intent To Distribute At Least 500 Grams Of Cocaine, Title 21, USC, Section 841(a)(1) and Title 18, USC, Section 2.

Penalty: 5 to 40 years BOP, 4 years supervised release, $2,000,000 fine and $50 assessment.

Date of Arrest: 1-17-90

Custodial Status: Released on $50,000 Corporate Surety Bond $100,000 Personal Surety Bond on 1-23-90.

Identifying Data

Date of Birth: Age: 32 Citizenship:

10-2-58
Race: White | Sex: Male | Cuban
Marital Status: Single
FBI No.: 168761T5 | SSN: 265-37-8214 | Dependents: 0
Education: 10th Grade | Marshal No.: 41734-004 | Other ID No.: Alien #11643153

Legal Address: 9722 S.W. 142nd Place, Miami, FL 33187
Detainers: None
Codefendants: None

Assistant U. S. Attorney	Defense Counsel
Ray Pierson	Joel DeFabio
155 South Miami Avenue Miami, FL (305) 536-5450	2121 Ponce De Leon Blvd Suite 430 Coral Gables, FL 33134 (305) 448-7200

Date report prepared: 10-4-90

Revised:

Mandatory Minimum [_]

PART A. THE OFFENSE

Charges and Convictions

1. On August 14, 1990, Humberto Garcia pled guilty to a one count indictment charging him with Possession With Intent To Distribute At Least 500 Grams Of Cocaine, in violation of Title 21, USC, Section 841(a)(1) and Title 18, USC, Section 2. Sentencing has been scheduled for November 2, 1990 at 9:00 a.m.

Related Cases

2. None

The Offense Conduct

3. Beginning in October, 1989, until January, 1990, Special Agent Forteza with the Drug Enforcement Administration (DEA) had several meetings and telephone conversations with Humberto Garcia to discuss the purchase of between 15 and 20 kilograms of cocaine. S/A Forteza was introduced to Garcia through a confidential informant (CI). During a meeting on November 16, 1989, S/A Forteza advised Garcia that he was interested in purchasing approximately 20 kilograms of cocaine. Garcia responded that he could provide the cocaine, however, he would deliver between three and five kilograms as a sample in the initial transaction. He agreed to provide additional quantities of cocaine subsequent to the initial transaction.

4. On January 17, 1990, the CI contacted S/A Forteza and advised that he had made arrangements to meet with Garcia for the delivery of three kilograms of cocaine. A meeting was arranged at a DEA undercover office for later that day. At approximately 7:30 p.m., Forteza met with Garcia and the CI at the undercover office at which time Garcia delivered three kilograms of cocaine. Upon receiving the cocaine, S/A Forteza placed the defendant under arrest.

5. Laboratory analysis of the cocaine revealed a net weight of 3007 grams of cocaine with 92% purity which results in a total net weight of 2,766 grams of 100% pure cocaine.

Adjustment For Obstruction Of Justice

6. The defendant was released on bond on January 23, 1990. On June 21, 1990, the U.S Attorney's office filed a motion to revoke the defendant's bond based on allegations of threats to the confidential informant. According to the government's motion, prior to the defendant's case going to trial, he had contacted the CI through close friends and

associates. According to the government's motion, the CI received threats over the telephone as well as in a face to face confrontation with an associate of the defendant's. During the face to face confrontation, the CI was informed by the defendant's associate that the defendant was angry and would take action against the CI. The associate cautioned the CI to be careful since the defendant is a dangerous guy.

7 This motion was brought before Magistrate Palermo who denied the 'notion based on insufficient evidence that the defendant instigated the threats.

8 Section 3C1.1 of the sentencing guidelines provides for an enhancement were the defendant willfully impedes or obstructs the administration of justice. One of the examples provided in the application notes is threatening or intimidating a witness. It would appear that the allegations made by the government would in fact constitute an obstruction of justice. However, this matter was brought before Magistrate Palermo and he entered a ruling that insufficient evidence existed to determine that the defendant was the instigator of the threats. Therefore, an enhancement for obstruction of justice would not be appropriate in this case.

Adjustment For Acceptance Of Responsibility

9. Subsequent to his arrest, the defendant made no statements to the authorities acknowledging involvement in any criminal offense. However, subsequent to his plea of guilty, he provided a statement to the U.S Probation Office outlining his involvement in this offense and acknowledging personal responsibility for his criminal conduct.

Offense Level Computation

10. Base Offense Level: The guideline for a Title 21, USC, Section 841 is found in Section 2D1.1 of the sentencing guidelines. This section provides that offenses involving three kilograms of cocaine have a base offense level of 28. Pursuant to 1B1.3 relevant conduct, the court could consider the total amount of cocaine negotiated by the defendant which amounted to between 15 and 20 kilograms. However, the government has no evidence or reliable information that the defendant had the ability to produce the amount of cocaine for which they were negotiating. Therefore, the guidelines have been calculated using the quantity of cocaine that the defendant actually produced.
28

11. Specific Offense Characteristics: None 0

12. Adjustment For Role In The Offense: None 0

13. Victim Related Adjustment: None 0

14. Adjustment For Obstruction Of Justice: None 0

15. Adjusted Offense Level (Subtotal): 28

16. Adjustment For Acceptance Of Responsibility: The defendant has admitted his involvement in the offense and has demonstrated personal acceptance of responsibility for his criminal conduct. Based on 3E1.1(a), the offense level is reduced two levels. -2

17. TOTAL OFFENSE LEVEL: 26

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

18. None

Criminal Convictions

	Date of Arrest	Charge/Agency	Date Sentence Imposed/ Disposition	Guideline/ Score
19.	1-12-79 (age 20)	Ct. 1: Possession of Cocaine Ct. 2; Sale Of Cocaine Ct. 3: Conspiracy To Commit A Felony North Miami Police Dept.	9-27-79: (Case #79-1004A) Adjudication withheld, 1 year probation with $500 fine.	4A1.2(e) (2)

Codefendant Margarita Aragunde met with an undercover police officer in her vehicle to discuss the purchase of two ounces of cocaine for $2,800. Shortly thereafter, Humberto Garcia appeared and gave the codefendant one ounce of cocaine which she then sold to the undercover officer for $1,400. The defendant was represented by counsel.

20.	7-26-83 (age 24)	Case #83-1737 Ct. 1: Carrying A Concealed Firearm	4A1.1c Adjudicated guilty on Cts. 1 & 4, 18 months

probation.

Ct. 2:	
Possession Of Cocaine	Probation terminated on 11-4-85
Ct. 3:	
Carrying A Concealed Firearm	
Ct. 4:	
Resisting Arrest Without Violence, Metro Dade PD, Miami, FL	

On July 26, 1983, the defendant was observed at the Mayfair Shopping Center in Coconut Grove, Florida, carrying a handbag which appeared to contain a large weapon. He attempted to enter a nightclub at which time a club employee observed the bag and asked the defendant if it contained a gun. The defendant responded affirmatively and a uniformed police officer at the scene overheard the conversation. The defendant was placed under arrest and subsequent to a search a small quantity of cocaine was found on his person. Subsequent to his arrest, the defendant made threats to the nightclub employee in front of the uniformed police officer. He stated that he intended to cause him physical harm and that he would hire a hit man from Colombia to kill him.

Garcia was represented by defense counsel P. Nalley. On May 4, 1984, he was placed on 18 months probation. On August 2, 1984, an affidavit for violation of probation was filed with the court alleging that the defendant had violated probation by committing a new offense of attempted murder and possession of a controlled substance on July 1, 1984. The affidavit and probation violation were subsequently dismissed on December 5, 1984. Probation terminated on November 4, 1985.

Criminal History Computation

21. The defendant has one prior criminal convictions with a total of one criminal history point. This results in a criminal history category of I.

Other Criminal Conduct

	Date of Arrest	Charge/Agency	Date Sentence Imposed/ Disposition
22.	1-25-78 (age 19)	Ct. 1: Burglary Ct. 2: Loitering and Prowling, Metro Dade, PD Miami, FL	Dismissed
23.	2-6-78 (age 19)	Ct. 1: Carrying A Concealed Firearm Ct. 2: Dealing In Stolen Property Ct. 3: Obstruction Of Justice, Metro Dade PD, Miami, FL	Dismissed
24.	11-17-78 (age 20)	Ct. 1: Possession Of Quaaludes, Miami Police PD, Miami, FL	Dismissed
25.	4-29-79 (age 20)	Ct. 1: Aggravated	No Information filed

		Assault On A Police Officer Ct. 2: Disorderly Conduct Ct. 3: Resisting An Officer Without Violence, Metro Dade PD, Miami, FL	
26.	3-22-80 (age 21)	Carrying A Concealed Firearm, Metro Dade PD, Miami, FL	No Information Filed
27.	1-26-83 (age 24)	Aggravated Assault, Metro Dade PD, Miami, Fl	Nolle Prossed
28.	10-1-83 Dismissed (age 25)	Obstruction By False Information, Metro Dade PD, Miami, FL	
29.	10-20-83 (age 25)	Ct. 1: Possession Of Machine Gun Ct. 2: Grand Larceny Ct. 3: Possession Of Firearm With Altered Serial Number	Nolle Prossed

Ct. 4:
Trafficking
In Cocaine
(73 grams)

Ct. 5:
Possession Of
Marijuana Over
30 Grams

Ct. 6:
Possession Of
Narcotic Equipment

Ct. 7:
Carrying Concealed
Firearm

Ct. 8:
Resisting Arrest
Without Violence

Probation

38. Statutory Provisions: The defendant is not eligible for probation as the offense of conviction is a Class "B" Felony, pursuant to Title 18, USC, Section 3561(a)(l).

39. Guideline Provisions: Probation is not authorized by the guidelines, as the offense of conviction is a Class "B" Felony, pursuant to 5B1.1(b)(1).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities and Community Ties

40. Humberto Garcia was born in Havana, Cuba on October 2, 1958. He is the second of three children born to Sarah Garcia. According to the defendant, his father, Humberto Garcia, was a Mexican citizen who was not married to his

mother. He has no other information concerning his father nor has he had any relationship with him. Since the age of~10, Garcia lived with his maternal grandfather, Luis Manuel Garcia. In 1960, Garcia immigrated to the United States with his godfather, Carlos Martinez. His mother and sisters immigrated approximately one year later. The family established a residence in Miami and Sarah Garcia supported her children through her work as a beautician. The defendant has two half sisters, Alicia Garcia and Lilyana Traub, both of whom reside in Miami, Florida. According to the defendant, he does not have a close relationship with his family and has not had much contact with them in the previous year. Garcia has resided in Miami, Florida since 1960. He is a resident alien known to INS under alien #A11643153.

41. Contact was made with the defendant's sister, Lilyana Traub. After advising her of the purpose of the inquiry by the U.S. Probation Office, it became clear that Ms. Traub intended to use her cooperation with the U.S. Probation Office as some form of inducement for the defendant to comply with her wishes. She provided no information concerning the defendant's family background and would only remark that she had not spoken with her brother since he came to her house and physically assaulted her a few months ago. She would provide no information concerning the defendant's mother or how she could be contacted. The Probation Officer was unable to get additional information concerning immediate family members in order to verify the defendant's family history.

42. Although Humberto Garcia is single and has never married, for the previous six years he had been involved in a relationship with Mercedes Diez, age 28. She and the defendant are cohabiting and their residence is located at 9722 S.W. 142nd Place. This is a three bedroom townhouse located in the Southwest Section of Dade County. According to Ms. Diez as well as Dade County Property Records, the residence was purchased by Ms. Diez in May of 1990 for approximately $95,000. The

home was purchased in Diez's name and the defendant has no financial interest in the residence. Also living at the residence is Ms. Diez' eight year old son, Anthony Diez. According to the defendant and Ms. Diez, they share a close relationship, but have no plans for marriage.

Mental And Emotional

43. Garcia denies any history of mental or emotional disorders. During the course of the interview, he was coherent, articulate and exhibited no signs of such disorders. He is bilingual, fluent in English and Spanish.

Physical Condition, Including Drug Dependence and Alcohol Abuse

44. Humberto Garcia is a white male who stands 5'6" tall, weighs 165 pounds with brown hair and brown eyes. He is reportedly in good health and has never suffered from any serious illnesses. He denies the use of any drugs or narcotics and denies any alcohol consumption. According to the defendant, he does not smoke cigarettes, consume caffeinated beverages or sugar.

Education And Vocational Skills

45. Garcia attended South Miami Senior High School, but withdrew during the 10th grade. His school transcripts from 1975 indicate the defendant was earning a "D" average prior to his withdrawal. He has had no further education or vocational training.

Employment

46. Since 1986, the defendant, in partnership with Mercedes Diez, has operated a business known as Honey Bee's Florist Inc. The business is located at 7273 N.W. 36th Street in Miami, Florida. This is a retail flowershop which provides flower arrangements for individuals as well as

commercial accounts. According to the defendant, he derives an income of approximately $300 per week as a result of this business. Honey Bee's Florist was incorporated in the State of Florida on April 16, 1986 under document #M30563. According to the defendant and Ms. Diez, no tax returns have been filed for the corporation since 1986. A visit was made to the flower shop which appears. to be a small commercial florist shop operated by the defendant and Ms. Diez exclusively. During the visit to the employment site, Ms. Diez was present and engaged in some commercial transactions with various individuals. She had just received a shipment of flowers which the defendant had been in the process of cleaning and sorting. According to Ms. Diez, the business has been suffering financially since December, 1989 when a motor vehicle collided with the front entrance of the shopw The vehicle drove through the glass door and window to the shop causing approximately $15,000 worth of damage to merchandise and to the premises. According to Ms. Diez, they received an insurance settlement of only $4,000.

47. From 1984 through 1985, Garcia was reportedly been employed with various men's clothing stores including Luciano's and Alexandro's. According to the defendant, he was employed as a commissioned sales person and averaged between $300 and $500 per week. Attempts to verify employment with these two companies met with negative results. It appears that both companies may now be out of business.

48. From 1983 until 1984, Garcia was reportedly employed with Lansons Men Clothing Store at the Omni International Mall. He reportedly worked on a full-time basis as a salesman, averaging $500 per week in commissions. Contact was made with the payroll manager for Lansons and their records reflect the defendant was employed from November 29, 1984 until February 9, 1985 as a commissioned salesman.

49. Prior to 1983, Garcia stated he was employed doing various jobs including waiting tables at restaurants, teaching martial arts and working at health clubs. He was unable to recall all of the various places he worked and the time sequence of his various employments.

PART E. FINES AND RESTITUTION

Statutory Provisions

50. The maximum fine for this offense is $2,000,000, pursuant to Title 21, USC, Section 846.

51. A special assessment fee of $50 is mandatory under Title .18, USC, Section 3013.

Guideline Provisions

52. The fine range for this offense is from $12,500, 5E1.2(c)(l)(A) and $2,000,000, 5E1.2(c)(4)(A).

53. Subject to the defendant's ability to pay, the Court shall impose an additional monetary amount that is at least sufficient to pay the costs to the Government for any imprisonment, probation, supervised release or community confinement, Section 5E4.2(i). The most recent advisory from the Administrative Office of the U.S. Courts dated May 11, 1989, suggests that a monthly cost of $1,210.05 be used for imprisonment, a monthly cost of $91.66 be used for supervision and a monthly cost of $938.44 be used for community confinement.

Defendant's Ability To Pay

ASSETS

Cash $ 0

Unencumbered Assets

1985 Chevrolet Van	$4,000
Equity in Other Assets	
*1990 Jeep Cherokee	$1,000
TOTAL ASSETS	$5,000
Unsecured Debts	
Credit Cards	$3,695
TOTAL UNSECURED DEBTS	$3,595
NET WORTH	$1,305

*Seized By The D.E.A.

MONTHLY CASH FLOW	
Net Salary	$1,200
TOTAL INCOME	$1,200
NECESSARY LIVING EXPENSES	
Mortgage	$400
Electric	$ 75
Telephone	$ 30
Groceries/Supplies	$150
Clothing	$100
Installment Payments	$155
Gas	
TOTAL NECESSARY EXPENSES	$910
NET MONTHLY CASH FLOW	$290

Analysis

54. The defendant reports only two assets, one of which is a 1985 Chevrolet an valued at $4,000. This van is used for transportation and deliveries for Honey Bee's Florist. In January, 1990, Garcia purchased a Jeep Cherokee for approximately $25,000. According to the installment contract, Garcia made a $6,000 cash down payment and financed the balance which resulted in a $500 per month car payment. At the time of his arrest, the DEA seized the jeep and it now the subject of forfeiture proceedings. According to the defendant, he only made a $1,000 cash down payment on the vehicle and has approximately $1,000 in equity. Although he holds half interest in Honeybee's Inc., this company has no significant liquid assets and many outstanding debts. Further information concerning the company's financial status is unavailable since no tax returns have been filed since its inception. He reports no other significant assets. He shares monthly expenses with his girlfriend, Mercedes Diez. The residence in which they live is owned exclusively by Ms. Diez. Based on the defendant's current financial profile, it appears that he is unable to pay a fine.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

55. There are no aggravating or mitigating circumstances concerning the offense or the defendant that would warrant a departure from the prescribed guideline range.

PART G. IMPACT OF THE PLEA AGREEMENT

56. The defendant pled guilty to a one count indictment and there is no plea agreement in this case.

/s/ Suzanne Ferreira
Suzanne Ferreira
U.S. Probation Officer

Reviewed and Approved:
/s/ [illegible] Carroll
[illegible] Carroll
U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

This probation officer certifies that the presentence report has been made available to the defendant, his attorney, and to counsel for the government.

OBJECTIONS

By the Government

The Government has reported no objections pursuant to Administrative Order 90-26.

By the Defendant

The defendant, through defense counsel makes one objection to the presentence investigation. The defense counsel points out that Paragraph 54, page 14 of the presentence investigation states the defendant purchased a vehicle in 1990 with a $6,000 cash down payment as reflected on a copy of an installment contract for the purchase.

According to the defendant, he made a $1,000 cash down payment. The balance of the down payment indicated on the installment contract consisted of factory rebates and allowances for a vehicle trade in.

Probation Officer's Response

The Probation Office has no objection to this additional information being included in the presentence investigation and will be made a part thereto by way of this addendum. There are no additional disputes with the presentence investigation.

Supreme Court U.S.
FILED

(3)

981340 FEB 17 '99

OFFICE OF THE CLERK

In the United States Supreme Court

WILLIAM COHEN,
Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA
Defendant-Appellee

Docket No. _____
October 1998 Term

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit 11th Circuit Docket No. 97-8737

Submitted on behalf of Plaintiff William Cohen by
Allan Falk, P.C.
by Allan S. Falk, Esq.
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66 pp

In the United States Supreme Court

WILLIAM COHEN,
Plaintiff-Appellant

vs.

Docket No. _____
October 1998 Term

UNITED STATES OF AMERICA
Defendant-Appellee

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

11th Circuit Docket No. 97-8737

Submitted on behalf of Plaintiff William Cohen by
Allan Falk, P.C.
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APPENDICES

Appendix No.	Identity of Document	Number of Pages
1	District Court Findings of Fact	10
2	District Court Judgment	1
3	Dist. Ct. Opinion of July 21, 1995	8
4	Dist. Ct. Opinion of Feb. 6, 1996	3
5	11th Circuit Opinion	14
6	11th Circuit Order	1
7	11th Circuit Order on Rehearing	1
8	Full Text of Constitutional Provisions and Statutes Involved	8
9	Humberto Garcia Presentence Report	17

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM COHEN,
Plaintiff,

V.

CIVIL ACTION
NO. CV294-179

UNITED STATES OF AMERICA
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action by Plaintiff, William Cohen, pursuant to the Federal Tort Claims Act, 28 USC § § 1346(b) and 2671. In substance, Cohen alleges that the Bureau of Prisons failed to protect him adequately and subjected him to an unreasonable risk of harm from a brutal physical assault by another inmate during Cohen's incarceration.

The case came on for a bench trial on April 28, 1997, and after hearing evidence and arguments of counsel, the Court enters the following findings:

FINDINGS OF FACT

1. Cohen formerly was an inmate at the Federal Correctional Institute in Jesup, Georgia, where he was registered as Federal Register Number 12639-039.

2. Cohen was convicted of infringement of copyright laws and trafficking in counterfeit labels, and sentenced to an eighteen month period of confinement.

3. Cohen began to serve his sentence in February of 1991, when he was sixty years of age.

4. On February 12, 1991, Cohen was designated to the Federal Prison Camp at FCI Jesup, which is a minimum security level satellite camp.

5. On February 8, 1992, Cohen and six or seven other inmates, including Humberto "Bert" Garcia, Federal Register Number 41734-004, were watching television in a television viewing room at FCI Jesup Prison Camp.

6. According to the institution's schedule, inmates were permitted to see and hear the evening news in the television room.

7. While listening to the news on the appropriate channel, Garcia abruptly changed the channel to one showing belly dancers. Cohen reminded Garcia of the institution's schedule and returned the TV channel back to the news.

8. After the news was over, the other inmates, excepting Garcia, left the TV room.

9. While Garcia and Cohen were alone, Garcia violently struck Cohen in the back of his head with a steel folding chair.

10. Cohen was rendered unconscious, and prison officials found him lying on the floor of the television viewing room shortly after 7:00 P.M.

11. Cohen immediately was transferred to Wayne County Memorial Hospital for medical treatment and, thereafter, in view of his serious injuries, was transferred to St. Joseph's Hospital in Savannah, Georgia.

12. Cohen initially was diagnosed as having suffered a skull fracture and a subdural hematoma.

13. Cohen underwent brain surgery at St. Joseph's Hospital, and remained hospitalized for approximately three weeks.

14. Cohen has suffered other injuries as a result of the subdural hematoma, including a permanent loss of taste and smell, memory loss, a lack of ability to concentrate, vertigo, and severe headaches. He is totally and permanently disabled. He was sixty-two years of age at the time of the assault, with a life expectancy of approximately fifteen years.

15. Garcia, at the time of the assault was a thirty-four year old, virile, person. He was serving a lengthy sentence for possession with intent to distribute cocaine.

16. On November 29, 1990, Garcia was designated to FCI Jesup Prison Camp. Garcia was thirty-two years of age when he began serving his sentence and thirty-four years of age at the time of the assault.

17. The designation of inmates to security classification levels is governed by the procedures outlined in the Bureau of Prisons Security Designation and Custody Classification Manual. Security Designation Manual Policy Statement 5100.02 was in effect in 1990, at the time that Garcia was designated.

18. The security level Designation Procedures are as follows. First, the Clerk of Court sends the judgment in a criminal case to the United States Marshal's Office once sentencing is completed. The Marshal then assigns an eight digit inmate identification number. The Marshal also compiles copies of the Presentencing Report, prepared by the United States Probation Office, the FBI "rap sheet," the judgment and commitment order, and the Marshal's custodial record.

19. Second, the Marshal forwards these documents to the appropriate Community Corrections Manager at the Bureau of Prisons, and requests a designation.

20. Third, the Community Corrections Manager enters information into a computerized tracking system known as SENTRY, and a Security Designation Form is generated. The Security Designation Form contains a summary of any detainers or pending charges on file, the nature of the current offense, the expected length of incarceration, prior commitments, a history of escapes or attempted escapes, a history of violence as shown only by prior convictions, pre-commitment status, public safety factors, and judicial recommendations. It must contain prior convictions.

21. Fourth, the Regional Designator designates an institution based on the information contained in the Security Designation Form that is obtained from SENTRY, as well as Central Information and Management Variables, such as an inmate's age, sentence limitations, inmate monitoring concerns, the racial balance and overcrowding at a particular institution, and an inmate's prior arrests. The Regional Designator does not have access to the Presentence Report, the FBI "rap sheet," nor the judgment and commitment order. Nor does he have access to the prior arrest record of the inmate. The Regional Designator tallies a "score" based on the information contained in the Security Designation Form. The Regional Designator is permitted to deviate from the security level that corresponds with the score, and assign an inmate to a higher security level, but n[illegible] a lower one.

22. The Security Designation Form for Garcia indicated that he was convicted of a moderate security level offense, with no history of escape.

23. Garcia was designated by Regional Designator Judy Parks as a Minimum Security Level inmate with "out custody," who was eligible for prison camp placement.

24. An inmate with "out custody" is assigned to less secure housing and is eligible for work details outside the

institution's perimeter, so long as he is escorted by prison officials.

25. In designating Garcia, Parks did not have the benefit of the information disclosing Garcia's prior felony convictions or arrest record.

26. Next, as previously stated, Garcia has numerous prior arrests that were not factored into a Security Level Designation. Those arrests were included in his presentencing report. Between 1978 and 1 984, Garcia was arrested ten different times, including arrests for loitering, carrying a concealed firearm, possession of a machine gun, dealing in stolen property, possession and sale of various illegal drugs, conspiracy, aggravated assault, resisting arrest, forgery, grand larceny, homicide, and aggravated battery.

27. The Court concludes that Garcia's record demonstrates that he was a violent person and the Court so finds.

28. Garcia's prior convictions were not included in Security Designation Form required by the Bureau of Prison Regulations.

29. Cohen was designated as a Minimum Security Level I inmate with ii community custody," who is eligible for prison camp placement.

30. An inmate with ~ custody," is assigned to the least secure housing, is eligible for work details outside of the institution perimeters, with minimal supervision.

31. The Bureau of Prisons failed to follow its own Security Designation Manual Policy Statement 5100.02, which was in effect at the time Garcia's institution of confinement was designated. The Community Corrections Manager failed to follow the BOP regulations.

32. If the Community Corrections Manager had included Garcia's two prior convictions and lengthy arrest record showing a high propensity for violence in the Security Designation Form, the Regional Designator would have assigned Garcia to a higher level security institution.

33. The failure of the BOP personnel to follow the BOP regulations and policies was the proximate cause of Cohen's injuries and damages.

34. Cohen's injuries are severe and permanent. He has permanently lost his sense of smell and his sense of taste. He also suffers substantial physical and mental pain and suffering.

35. Cohen failed to establish any loss of future earnings with reasonable certainty, although his ability to work and labor has been destroyed because of his physical impairments.

36. Cohen's damages are $250,000.

CONCLUSIONS OF LAW

The Court has jurisdiction of this claim pursuant to the Federal Tort Claims Act ("FTCA"), which is codified in Sections 1346(b) and 2671 of Title 28 of the United States Code. The Act provides a general waiver of the sovereign immunity of the United States and allows private rights of action against the United States and its agencies for specified torts committed by federal government employees. In other words, the FTCA allows suits against the federal government as if those suits were filed against a private individual.

Pursuant to Section 2674, the United States "shall be liable, respecting the provisions of [the Act] relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." With very few exceptions that are not applicable in Cohen's case, the Act provides the exclusive

remedy for the injuries that Cohen claims to have suffered as a result of the alleged acts of employees at FCI Jesup.

The Act is limited by its terms, and private rights of action may be asserted against the United States only if specifically authorized by the Act. Pursuant to Section 1 346, a private plaintiff may bring suit for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Cohen exhausted his administrative remedies as required by Section 2675.

While the Act provides a general waiver of sovereign immunity, the Act also contains several exceptions that expressly disallow private rights of action against the United States.

Section 2680 of the Act outlines those exceptions, including the "discretionary function" exception that is codified at Section 2680(a). This Section of the Act expressly forbids private rights of action for "[any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The Court concludes as a matter of law, over objection by the United States, that subject matter jurisdiction over this matter is proper and that the discretionary function exception does not apply to the facts of this case for the reasons set forth in prior Orders of this Court disposing of motions to dismiss. Accordingly, the Court concludes that Cohen's action is properly before this Court.

The Court also concludes as a matter of law that the duty owed to Cohen while incarcerated at FCI Jesup is governed by both statute and regulation. Section 4042 of Title 1 8 of the United States Code establishes that the Bureau of Prisons owes a duty of care to inmates entrusted to that agency.

That section states that the Bureau of Prisons, under the direction of the Attorney General shall "provide suitable quarters and provide for the safekeeping care, and subsistence of all persons charged with or convicted of offenses against the United States." (emphasis supplied)

Section 4042(3) states that the Bureau of Prisons shall "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States."

Accordingly, the Court concludes as a matter of law that the Bureau of Prisons, acting through FCI Jesup employees, owed a non-discretionary, statutory duty of safekeeping, care, and protection of Cohen during his stay at that federal facility.

Additionally, the Security Designation Manual Policy Statement 1500.02, in combination with Section 3621(b) of Title 18 of the United States Code, govern the placement of inmates within federal correctional institutions and allows limited discretion to the federal employees tasked with placing federal inmates.

Section 3621(b) states that the Bureau of Prisons shall designate the place of a prisoner's confinement based upon (1) the resources of the facility, (2) the nature and circumstances of the offense, (3) the history and characteristics of the prisoner (4) any statement by the sentencing court, and (5) any pertinent policy statement issued by the Sentencing Commission.

Pursuant to Section 2674 of the Act, state substantive law applies concerning whether Cohen has stated a proper claim for relief.

The Court concludes as a matter of law that the negligence laws of the State of Georgia apply to the facts of this case.

Pursuant to the laws of Georgia, Cohen must establish four elements in order to prevail on his negligence claim against the United States. Cohen must establish that the Bureau of Prisons and FCI Jesup employees had a legal duty to protect him from unreasonable risks of harm, that such duty was breached, that there was a causal connection between that breach and his injuries, and that his loss, damage, or injury was proximately caused by Defendant's breach of the duty owed.

In order to recover for his claimed injuries, Cohen also is legally required to establish that the United States had some degree of notice of Garcia's propensity for violence before the Government may be held liable for the assault upon Cohen.

The Court concludes that the employees of the Bureau of Prisons failed to follow its own regulations in that the Community Correction Manager failed to include in the Security Designation Form the prior felony convictions of Garcia. If such convictions had been entered, and Garcia's lengthy arrest record considered, the officer charged with designating the corrections facility would have assigned Garcia to a higher level security institution than the Jesup Camp facility.

The Court concludes as a matter of law that Cohen has proven his right to recover under the negligence law of Georgia, and that the United States did have notice of Garcia's propensity for violence. The Court further concludes that Defendant failed to protect adequately Cohen from the attack by Garcia.

In coming to these conclusions, the Court has considered the two part test required to be used in order to determine whether challenged governmental conduct falls within the discretionary function exception. First, a determination must be made whether the challenged conduct involved an element of choice of judgment. The relevant inquiry is whether a controlling statute or regulation

mandates that a government agent perform his or her function in a specific function.

A determination must be made whether the choice or judgment made by the government official is of the kind that the discretionary function was designed to shield. In this case, as previously stated, the BOP failed to follow its own regulations mandating that its agents perform their functions in a specific manner.

Accordingly, the Court finds as a matter of fact and concludes as a matter of law that Cohen is entitled to a judgment in the sum of Two Hundred Fifty Thousand ($250,000) Dollars against the Defendant.

The Clerk is directed to enter an appropriate judgment in accordance with the findings and conclusions.

SO ORDERED, this 15th day of May, 1997.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

AO 450 (Rev. 5/85) Judgment in a Civil Action

United States District Court

Southern District of Georgia

WILLIAM COHEN

JUDGMENT IN A CIVIL CASE
CASE NUMBER CV294-179

v

UNITED STATES OF AMERICA

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that in accordance with the Findings of Fact and Conclusions of Law entered by the Court on May 15, 1997 finding that the Plaintiff is entitled to a judgment; judgment is hereby entered in favor of the Plaintiff, WILLIAM COHEN, and against the Defendant, UNITED STATES OF AMERICA, in the amount of TWO HUNDRED FIFTY THOUSAND DOLLARS AND ZERO CENTS ($250,000.00), and that the Plaintiff does have and recover his costs of Court, in his behalf expended, such costs to be taxed by the Clerk.

Approved: /s/ Anthony A. Alaimo

Judge, U.S. District Court

May 15, 1997
Date

Henry R. Crumley, Jr.
Clerk

/s/ Sherry Taylor
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM COHEN, CIVIL ACTION

Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant. NO. CV294-179

ORDER

William Cohen, a former inmate at the Federal Correctional Institution in Jesup, Georgia ("FCI Jesup"), brings this action, pro se under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346; 2671, et seq., for injuries resulting from an assault upon him by another inmate.

Cohen claims that the Government failed to protect him from foreseeable assault and failed to follow proper procedures in assigning his assailant to a minimum security prison camp rather than to a properly supervised institution.

Before the Court is the Government's Motion to Dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Government contends that the Court lacks subject matter jurisdiction over this matter because it falls within the discretionary function exception to the FTCA. As discussed below, the Government's motion will be **DENIED.**

FACTS

In 1991, William Cohen was sentenced to eighteen months in prison for infringement of copyright laws and trafficking in counterfeit labels. After reviewing Cohen's file, prison officials rated Cohen as a "minimum" security inmate with "community" custody. As a result of these ratings, prison officials designated

Cohen to FCI Jesup Prison Camp, a "minimum" security facility for inmates with "community" custody or "out" custody.

On February 8, 1992, Cohen was watching television in the television room at FCI Jesup. Cohen and another inmate, Humberto Garcia, began arguing about changing the channel. Garcia then attacked Cohen and struck him in the head with a metal folding chair. No one witnessed the incident. At the time of the attack, Cohen was sixty years old. Garcia was thirty-three.

Shortly after 7:00 P.M., prison officials found Cohen unconscious on the floor of the television room. He was bleeding from his ears and mouth. After prison health providers examined Cohen, they transferred him to Wayne County Memorial Hospital where he was diagnosed as having a possible skull fracture and a subdural hematoma. Cohen later underwent brain surgery at St. Joseph's Hospital in Savannah, Georgia.

According to his complaint, Cohen suffers permanent injuries including a loss of sense of smell and taste, headaches, memory loss, lack of concentration, and general weakness. He also contends that he will never be able to maintain gainful employment.

At the time of the incident, Garcia was serving a five to forty year sentence for possession of cocaine with intent to distribute. He had been an inmate at FCI Jesup since November of 1990, when prison officials rated him as a "security level one" inmate with "out" custody.

Garcia received a "security level one" rating despite his previous convictions and extensive arrest record. Over the span of several years, Garcia was arrested for burglary, loitering, carrying a concealed firearm, possession of quaaludes, aggravated assault on a police officer, possession of cocaine, intimidation of a public officer, possession of a machine gun and attempted murder. None of these arrests resulted in a conviction. Garcia did have prior convictions for conspiracy to commit a felony, carrying a concealed firearm, and resisting arrest without violence.

Cohen contends that the Government failed to follow its own procedures in rating Garcia as a "security level one" inmate and designating him to a "minimum" security facility. Cohen also argues that prison officials failed to supervise Garcia so as to protect Cohen from a foreseeable attack.

After the attack, prison officials transferred Garcia to a prison facility with higher security standards than FCI Jesup.

PROCEDURAL BACKGROUND

On March 20, 1995, the Government filed a motion for summary judgment contending that it was not negligent as a matter of law. The Court denied the motion after finding that genuine issues of material fact remained as to whether the Government was negligent.

On May 23, 1995, the Government filed the present motion to dismiss, contending that the Court lacks subject matter jurisdiction over this case because it falls within the discretionary function exception to the FTCA.

DISCUSSION

I. Motion to Dismiss under 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a complaint on the ground that the Court lacks subject matter jurisdiction. A 12(b)(1) motion can take either of two forms. A "facial attack" on the complaint requires the court to assess whether the plaintiff has alleged a sufficient basis of subject matter jurisdiction. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (citing Menchaca v. Chrysler Credit Corp. 613 F.2d 507, 511 (5th Cir.), cert. denied, 449 U.S. 953 (1980)). For purposes of a "facial attack," the allegations in the complaint are taken as true. Lawrence, 919 F.2d at 1529.

The second type of 12(b)(1) motion is a "factual attack," which challenges the court's subject matter jurisdiction "in fact."

Id. In evaluating a "factual attack," the Court may consider matters outside the pleadings, and "no presumptive truthfulness attaches to plaintiff's allegations." Id. Furthermore, "the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Id.

Here, the Government asserts the FTCA's discretionary function exception, thereby requiring a factual inquiry as to whether this exception indeed applies. Accordingly, the Court will consider materials outside of the pleadings, and "no presumptive truthfulness" will attach to Cohen's allegations. Id. If the discretionary function exception applies, the case must be dismissed for lack of subject matter jurisdiction. Williams v. United States, 50 F.3d 299, 3C5 (4th Cr. 1995).

II. Discretionary Function Exception to the FTCA

The United States may not be sued unless it waives sovereign immunity. The FTCA constitutes such a waiver by providing a cause of action against the United States for plaintiffs injured by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1976). The FTCA's waiver of sovereign immunity is limited, however, by the discretionary function exception which precludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

In determining whether the discretionary function exception applies, the Court conducts a two-part test. First, the Court must determine whether the decision at issue is discretionary. Berkovitz v. United States, 486 U.S. 531, 536 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988) If the decision is discretionary the Court must then determine whether the decision involves consideration of social, economic or political policies. Id. If both tests are satisfied, the discretionary function exception applies. In conducting the two-part test, the Court should focus on the "nature of the conduct," rather than the status of the government actor. United States v. S.A. Empresa de Viacao Aerea

Rio Grandense (Varig Airlines), 467 U.S. 797, 813, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984).

A. Is the Decision Discretionary?

A particular decision is discretionary if it involves an "element of judgment or choice." Berkovitz, 486 U.S. at 536. The discretion referred to is "the discretion of the executive or the administrator to act according to one's judgment of the best course . . .." Dalehite v. United States, 346 U.S. 1 5, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953). Accordingly, a decision is not discretionary if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." Berkovitz, 486 U.S. at 536. As the Supreme Court has noted, "if an employee violates the mandatory regulation[] there will be no shelter from liability because there is no room for choice." United States v. Gaubert, 499 U.S. 315, 324, 111 S.Ct. 1267, 1274, 113 L.Ed.2d 335 (1991).

For a regulation or policy to be considered mandatory, however, it must constitute a "specific mandatory directive," such that "those charged with [the regulation's) implementation are not afforded wide latitude regarding its execution." Berkovitz, 486 U.S. at 544.

B. Is the Discretionary Decision Grounded in Social, Economic or Political Policy?

If the decision involved is indeed discretionary, the Court must then decide whether the choice or judgment is of the kind that Congress intended to shield from tort liability. Varig Airlines, 467 U.S. at 813. In this regard, the discretionary function is designed to shield "legislative and administrative decisions grounded in social, economic, and political policy." Id. at 814. "The presumption under the law is that when exercising discretion accorded to it, the government's actions will be grounded in policy." Kirchmann v. United States, 8 F.3d 1273, 1277 (8th Cir.

1993). As the Fourth Circuit has noted, a decision is grounded in policy if the government employee's "judgment or choice advances the purposes of a regulatory scheme that gives an employee such discretion." Williams 50 F.3d at 309.

III. Prison Officials' Decision to Designate Garcia to FCI Jesup Prison Camp

Cohen contends that the Government failed to follow its own procedures in assigning Garcia to a minimum security facility. The Government argues that designation of inmates to particular facilities within the federal prison system is protected by the discretionary function exception to the FTCA.

Generally, "[t]he discretionary exception to the FTCA bars any recovery predicated on the classification of inmates." Bailor v. Salvation Army, 854 F. Supp. 1341, 1366 (N.D. Ind. 1994)(quoting Reed v. Hadden, 473 F. Supp. 658, 660 (D. Colo. 1979)), aff'd, 51 F.3d 678 (7th Cir. 1995). Indeed, the Bureau of Prisons is granted discretion in designating inmates to particular institutions. See e.g. 18 U.S.C. § 3621(b).

Nonetheless, prison officials do not have discretion to ignore the required steps of the decision-making process. Bailor, 854 F. Supp. at 1 366 (citing Payton v. United States, 679 F.2d 475, 481 (5th Cir. 1982)). Furthermore, if a policy or regulation specifically prescribes a course of action," then the discretionary function exception does not apply, for the prison official "has no rightful option but to adhere to the directive." Berkovitz, 486 U.S. at 536. Accordingly, when evaluating the propriety of the discretionary function exception, the district court must consider any policies or regulations which govern the decision at issue. See, e.g., Valdez v. United States, 56 F.3d 1177 (9th Cir. 1995)(court examined National Park Service Guidelines); Sanchez v. Bellefeuille, 855 F. Supp. 587 (N.D.N.Y. 1994)(court examined Border Patrol handbook); Bailor, 854 F. Supp. at 1367 (court examined prison Program Statements).

The designation of prisoners to particular institutions is governed by the "Security Designation and Custody Classification

Manual, Program Statement 5100.05" ("Program Statement"). The Program Statement provides detailed, step-by-step procedures for designating inmates to various federal prison facilities. Some of these procedures constitute "specific mandatory directives" such that prison officials have no choice but to adhere to them. For example, prison officials "shall complete . . . a Security Designation Form on all cases with terms exceeding thirty days." (Program Statement, Chap. 4, p. 2)(emphasis added) The Program Statement also dictates specific, "required" information that must be included on the Security Designation Form such as "any history of incarceration, violence, or escape." (Program Statement, Chap. 4, p.2) Furthermore, affidavits submitted by the Government indicate that particular portions of the designation process are rather mechanical and non-discretionary: "[Garcia] 'scored out' as being appropriate for a satellite camp designation." (Binion Aff. ¶ 5)(emphasis added)

Other aspects of the designation process, however, require the exercise of discretion. For example, prison officials must use their best judgment in deciding whether an inmate's designation should be affected by certain "overriding reasons such as Sentence Limitations, Management Variables or Public Safety Factors. (Program Statement, Chap. 4, p.3).

Accordingly, while the discretionary function exception may apply to some procedures in the Program Statement, it does not apply to other procedures. At the present time, the record is unclear as to which provisions of the Program Statement Cohen contends were violated. Thus, dismissal of Cohen's complaint is premature.

As the Supreme Court has noted, allegations contained in a pro se complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers Haines v. Kerner, 404 U.S. 519,520,92 S.Ct. 594,30 L.Ed.2d 652(1972). Under this standard, dismissal is inappropriate.

IV. Prison Officials' Failure to Protect Cohen

Cohen contends that the Government was negligent in failing to protect him from Garcia when it knew of Garcia's violent propensities. Again, the Government argues that the discretionary function exception bars Cohen's claim.

The discretionary function exception does not apply to claims such as this. United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); Cohen v. United States, 252 F. Supp. 679, 687 (N.D. Ga. 1966), rev'd on other grounds, 389 F.2d 689 (5th Cr. 1967). In United State v. Muniz, the Supreme Court held that an action may be maintained under the FTCA for personal injuries sustained by a federal prisoner as a result of the negligent acts or omissions of government employees. Muniz, 374 U.S. at 1 52. In Cohen v. United States, the court adhered to this principle by refusing to apply the discretionary function exception to a federal prisoner's FTCA claim based upon assault by another inmate:

"Whatever is done or not done at any institution involves a decision by someone, but this does not mean that all acts are exempt from tortious liability as discretionary." Cohen, 252 F. Supp. at 687. As stated in the Court's previous order, "[in prisoner assault cases, the proper inquiry is 'whether [the] assault on [the plaintiff] was a danger that was apparent or should have been apparent to prison officials on the basis of the information then available to them.'" Order, Apr. 28, 1995 at 7 (Dkt. # 9)(quoting Cowart v. United States, 617 F.2d 112, 11 6 (5th Cir. 1980)).

CONCLUSION

For the reasons stated above, the Government's Motion to Dismiss (Dkt. # 13) is **DENIED.**

SO ORDERED, this 21st day of July, 1995.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM COHEN, CIVIL ACTION

Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant. NO. CV294-179

ORDER

William Cohen, a former inmate at the Federal Correctional Institution in Jesup, Georgia ("FCI Jesup"), brings this action, pro se, under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346; 2671 et sea., for injuries resulting from an assault upon him by another inmate, Humberto Garcia. Cohen claims that the Government, as it acted through the Federal Bureau of Prisons ("BOP"), failed to protect him from foreseeable assault and failed to follow proper procedures by assigning his assailant to a minimum security prison camp, rather than to a properly supervised institution.

Before the Court is the Government's Renewed Motion to Dismiss or, in the alternative, for Summary Judgment. In this motion, the Government contends that Cohen's claim relating to the improper assignment of his assailant is barred by the discretionary function exception to FTCA. This issue has already been discussed by the Court in two previous orders. (See Court's Orders of April 28, 1995 and July 21, 1995). For the reasons stated below, this renewed motion will be DENIED.

In the Order of July 21, 1995 the Court stated:

> Generally, "[t]he discretionary exception to the FTCA bars any recovery predicated on the classification of inmates." Bailor v. Salvation Army, 854 F. Supp. 1 341, 1 366 (N.D. Ind. 1 994)(quoting Reed v. Hadden, 473 F. Supp. 658, 660 (D. Coo. 1979)), aff'd, 51 F.3d 678 (7th Cir. 1995). Indeed, the Bureau of Prisons is granted discretion in designating inmates to particular institutions. See, e.g., 18 U.S.C. § 3621(b).
>
> Nonetheless, prison officials do not have discretion to ignore the required steps of the decision-making process. Bailor, 854 F. Supp. at 1366 (citing Payton v. United States, 679 F.2d 475, 481 (5th Cir. 1982)). Furthermore, if a policy or regulation "specifically prescribes a course of action," then the discretionary function exception does not apply, for the prison official "has no rightful option but to adhere to the directive." Berkovitz, 486 U.S. at 536.

(Order p.8).

At the time of the Court's previous order, the correctness of BOP's actions was not clear. Insufficient information was presented and the Court was unable to determine if BOP complied with Program Statement 5100.2, a policy statement which detailed the manner for designating the security level for federal inmates. As the Court stated at the time, BOP cannot meet the requirements of the discretionary function exception if its actions did not comply with its own policy and regulatory guidelines. Bailor, 854 F. Supp. at 1 366 (citing Payton v. United States, 679 F.2d 475, 481(5th Cir. 1982)).

The Government's present motion provides the Court with additional information. A blank inmate load and security designation form and instructions, which are used to calculate the security level of an inmate, have been provided to the Court. (Def. Ex. 1, Attach. A, Sec. 8-9). Affidavits by BOP employees have also been provided in an attempt to explain the security designation form. (See Det. Ex. 1, 2). While this information is helpful, it does not provide a sufficient basis for the Court to conclude that BOP complied with the requirements of Program Statement 5100.2.

The Court has not been provided with a completed inmate load and security form detailing the characteristics of Cohen's attacker, Garcia. In addition, the Court has not been provided with sufficient information to recreate this form. The Court is also troubled by the fact that BOP officials have stated under oath that Cohen's attacker had no previous convictions, while information provided by Cohen indicates that Garcia had at least one conviction. (See Def. Ex. 1 ¶ 16, Def. Ex. 2 ¶ 4, and Pl. Ex. 2 p.5).

CONCLUSION

Under these circumstances, the Court cannot conclude that the BOP fully complied with its own policies and regulations. Allegations contained in a pro se complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers. . . ." Haines v. Kerner, 404 U.S. 519, 520 (1972). As such, the Government's motion to dismiss or, in the alternative, for summary judgment is **DENIED.**

SO ORDERED, this 6th day of February, 1996.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES' DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8737.

William COHEN,
Plaintiff-Appellee, Cross-Appellant,
v.
UNITED STATES of America,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Georgia
Aug. 26, 1998.

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

CARNES, Circuit Judge:

While incarcerated in a minimum security federal prison, plaintiff William Cohen was injured when he was attacked by another prisoner. He sued the United States under the Federal Tort Claims Act asserting that the Bureau of Prisons had negligently assigned his attacker to a minimum security prison. After a bench trial, the district court entered judgment for Cohen and awarded him $250,000. Because we conclude that the discretionary function exception to the Federal Tort Claims Act shields the United States from liability in this case, we reverse that judgment.

I. BACKGROUND

In 1991, Cohen was sentenced to eighteen months in prison for copyright violations. The Bureau of Prisons ("BOP") classified him as "security level 1," the lowest security classification in the federal correction system, and it placed him in the minimum security Community Corrections Center at the Jesup, Georgia

Federal Corrections Institution. On February 8, 1992, Cohen was watching television in a common area of the prison. When Humberto Garcia, one of the other inmates, changed the channel, Cohen objected and changed the television back to its original channel. Later, after all the other inmates had left the room, Garcia picked up a metal chair and repeatedly beat Cohen on the head. As a result of Garcia's attack, Cohen underwent neurological surgery and spent three weeks in the hospital. Since his hospitalization, Cohen is unable to walk normally, suffers from severe headaches, has permanent short- term memory problems, and has lost his sense of taste and smell. After exhausting his administrative remedies, Cohen filed a claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., alleging that the government's negligence was responsible for his injuries. After a bench trial, the district court entered judgment in favor of Cohen, rejecting the government's arguments (1) that the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a) barred Cohen's FTCA claim and therefore deprived the district court of jurisdiction, and (2) that the BOP had not been negligent. The court awarded Cohen $250,000 in damages.

The United States appeals, challenging the district court's legal conclusion that the discretionary function exception did not apply, and its factual finding that the BOP was negligent. Cohen cross-appeals, seeking increased damages.

II. STANDARD OF REVIEW

We review a district court's legal conclusion de novo and its fact findings for clear error. See, *e.g.*, *Lykes Bros., Inc. v. United States Army Corps of Eng'rs*, 64 F.3d 630, 634 (11th Cir.1995). Whether the United States is entitled to application of the discretionary function exception to the FTCA is a question of law we review de novo. See *Ochran v. United States*, 117 F.3d 495, 499-500 (11th Cir.1997).

III. DISCUSSION

Cohen's theory of liability is that the BOP was negligent in classifying Garcia as "security level 1," the lowest security classification in the federal correction system, and placing him at the minimum security Jesup institution. According to Cohen, had Garcia been assigned a higher security level as allegedly warranted by his criminal history, Garcia's attack and Cohen's injuries would not have occurred. The Government contends that it cannot be held liable for any alleged negligence in determining Garcia's custody classification because the prisoner custody classification process performed by the BOP falls within the FTCA's discretionary function exception, 28 U.S.C. § 2680(a). Cohen first responds that the discretionary function exception does not apply to the BOP's classification of prisoners because 18 U.S.C. § 4042 establishes a non-discretionary duty of care on the part of the BOP toward prisoners which removes any discretion the BOP might otherwise have in this regard. In the alternative, Cohen argues that even if Congress did allow the BOP discretion in classifying prisoners, the BOP constrained its discretion in this regard by promulgating internal guidelines for its personnel to follow in classifying prisoners. According to Cohen, because BOP personnel did not follow those guidelines when they classified Garcia, the discretionary function exception does not apply in this case.

In addressing these contentions, we will begin by discussing the nature of the discretionary function exception and the prerequisites for its application. We will then discuss whether the BOP's classification of prisoners and placement of them in institutions meet those criteria. Finally, we will discuss whether the BOP failed to follow its own guidelines concerning the classification of prisoners with the result that the discretionary function exception is inapplicable in this case.

A. The Discretionary Function Exception

The FTCA "waives the United States government's sovereign immunity from suit in federal courts for the negligent actions of its employees." *Ochran*, 117 F.3d at 499. The FTCA waiver of immunity is subject to several exceptions. The

discretionary function exception, which is at issue in this case, precludes government liability for "[a]ny claim based upon ... the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If the discretionary function exception applies, the FTCA claim must be dismissed for lack of subject matter jurisdiction. See, *e.g.*, *Powers v. United States*, 996 F.2d 1121, 1126 (11th Cir.1993). The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984). Congress believed that imposing liability on the government for its employees' discretionary acts "would seriously handicap efficient governmental operations." *Id.* at 814, 104 S.Ct. at 2765 (internal citations and quotations omitted).

The Supreme Court has enunciated a two-part test for determining whether the discretionary function exception bars suit against the United States in a given case. See *Ochran*, 117 F.3d at 499. First, "we consider the nature of the conduct and determine whether it involves 'an element of judgment or choice.' " Id. (quoting *United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273, 113 L.Ed.2d 335 (1991)). "Government conduct does not involve an element of judgment or choice, and thus is not discretionary, if 'a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive.' " Id. (quoting *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273 (internal citations and quotations omitted)).

Second, "if the conduct at issue involves the exercise of judgment, we must determine whether that judgment is grounded in considerations of public policy." Id. "[T]he purpose of the exception is to prevent judicial second-guessing of legislative and

administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1273 (internal quotations and citations omitted). "In making this determination, we do not focus on the subjective intent of the government employee or inquire whether the employee actually weighed social, economic, and political policy considerations before acting." *Ochran*, 117 F.3d at 500. Instead, we "focus on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325, 111 S.Ct. at 1275.

B. Whether the BOP's Classification of Prisoners and Placement of Them in Institutions Involves Conduct or Decisions That Fall Within the Discretionary Function Exception

In determining whether the discretionary function exception applies in this case, we first address whether the BOP's decisions concerning classification of prisoners and what institution to place them in "involve an element of judgment or choice." *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273. Cohen contends that the BOP's decisions in this regard do not meet this first prong of the two-part discretionary function exception test. In support of his contention, Cohen points to 18 U.S.C. § 4042, which provides in relevant part that "[t]he Bureau of Prisons, under the direction of the Attorney General, shall ... provide for the safekeeping, care, and ... protection ... of all persons charged with or convicted of offenses against the United States." He contends that this language establishes a non-discretionary duty of care toward prisoners. In particular, Cohen argues that the § 4042 duty of care applies to the BOP's decisions concerning prisoner custody classification and thus removes cases, such as this one, where one prisoner assaults another, from the discretionary function exception. Under Cohen's theory, the BOP violated its § 4042 duty of care when it classified Garcia at the lowest security classification and placed him in the same minimum security institution as Cohen.

Cohen cites several decisions which he asserts support his contention that § 4042 imposes a non-discretionary duty of care on

BOP personnel and takes this case outside the discretionary function exception. However, we find those decisions neither controlling nor persuasive on this issue. First, Cohen cites the Supreme Court's decision in *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). In that case, the Supreme Court merely held that prisoners as a class were not barred from bringing claims under the FTCA. See id. at 158, 83 S.Ct. at 1855. However, the Court expressly reserved the issue of whether the discretionary function exception applies to cases in which prisoners allege that the BOP has negligently violated a duty of care. See *id.* at 163, 83 S.Ct. at 1858 (declining to "intimate any opinion upon [the] applicability" of the discretionary function exception to negligence claims brought by the prisoners in that case).

Next, Cohen cites a pair of former Fifth Circuit cases, *Jones v. United States*, 534 F.2d 53 (5th Cir.1976), and *Cowart v. United States*, 617 F.2d 112 (5th Cir.1980). In both *Jones* and *Cowart*, we simply affirmed the district court's finding that the BOP had not breached any duty of care owed to a prisoner who was attacked by another prisoner. See *Jones*, 534 F.2d at 55; *Cowart*, 617 F.2d at 119. Because we did not address the discretionary function exception, and did not find liability in Jones, that case cannot support Cohen's position that § 4042 establishes a non-discretionary duty that removes from the discretionary function exception cases in which prisoners in the care of the BOP are assaulted by another prisoner.

As for *Cowart*, although not essential to the holding, we did state that the discretionary function exception does not apply to cases in which a prisoner alleges negligence on the part of the BOP because "the actions of prison officials are at the 'operational level.' " *Cowart*, 617 F.2d at 116 n. 15. However, any weight that would otherwise attach to that dicta has been vitiated by the Supreme Court's subsequent decision in *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). The Supreme Court held in *Gaubert* that the mere fact a government official performs an action at the "operational level" (as opposed to the "planning level") does not remove that official's action from the discretionary

function exception for purposes of suits under the FTCA. See *id.* at 325, 111 S.Ct. at 1275. Where one of our prior panel opinions conflicts with a later Supreme Court decision, we are compelled to follow the Supreme Court's decision. See, *e.g.*, *Gianelli Money Purchase Plan and Trust v. ADM Investor Serv., Inc.*, 146 F.3d 1309 (11th Cir.1998); *Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir.1996). We do so here.

Finally, Cohen cites the Third Circuit's decision in *Jones v. United States*, 91 F.3d 623 (3d Cir.1996). In that case, a prisoner alleged that the BOP, by withholding his medication, had breached the § 4042 duty of care to protect him. The Third Circuit held that those allegations were sufficient to avoid summary judgment. See *id.* at 625. However, because the panel in that case did not even discuss the discretionary function exception, that case does not persuade us to adopt Cohen's proposition that § 4042 establishes a non- discretionary duty that makes the discretionary function exception inapplicable in cases, such as Cohen's, where a prisoner is attacked by another prisoner.

Furthermore, even if § 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception. We believe our conclusion in this regard is mandated by our holding in *Ochran v. United States*, 117 F.3d 495 (11th Cir.1997), and is buttressed by the Seventh Circuit's decision in *Calderon v. United States*, 123 F.3d 947 (7th Cir.1997). In *Ochran*, a witness in a federal drug trial was harmed by the drug defendant, allegedly due to the failure of the United States Attorney to protect her. The plaintiff argued that a regulation which required the United States Attorney to protect her created a non-discretionary duty, with the result that the discretionary function exception did not shield the United States from liability under the FTCA. Not unlike § 4042, the regulation at issue there stated that United States Attorneys "shall ... protect [witnesses] against ... harm ... from a suspect." *Ochran* 117 F.3d at 500. We nonetheless held in *Ochran* that the discretionary function exception did apply because the use of the language "shall

... protect" did not mean that the regulation "left no room for the [U.S. Attorney] to exercise judgment or choice" about how to protect witnesses. Id. at 500. Thus, *Ochran* stands for the proposition that even though a statute or regulation imposes a general duty on a government agency, the discretionary function exception may still apply if the agency retains sufficient discretion in fulfilling that duty. That is what we have in this case.

The Seventh Circuit's reasoning in *Calderon* also convinces us that § 4042 leaves BOP personnel sufficient discretion about how their § 4042 duty of care is to be accomplished to warrant application of the discretionary function exception. Calderon rejected the argument that the general duty to protect prisoners set forth in § 4042 prevents the Government from invoking the discretionary function exception in an FTCA case arising from a prisoner-on-prisoner attack. The Seventh Circuit reasoned persuasively that "[w]hile it is true that [§ 4042] sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates." *Calderon* 123 F.3d at 950. We agree.

Thus Cohen's reliance on § 4042 is misplaced. As the Seventh Circuit explained, for such an "argument to be effective, [the plaintiff] must demonstrate that § 4042 sets forth nondiscretionary actions which BOP personnel were required to undertake to protect [him]." *Id.* Section 4042 does not set forth any required nondiscretionary actions. Therefore, we reject Cohen's argument that § 4042 imposes a non-discretionary duty of care on the BOP which removes this case from the discretionary function exception.

Nor does any other statutory provision impose a non-discretionary duty of care on the BOP in classifying prisoners and placing them in institutions. To the contrary, two statutory provisions give the BOP discretion in this regard. The first of these is 18 U.S.C § 4081, which provides in relevant part that prisoners

should be classified:

> according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to [Federal penal and correctional] institutions.

18 U.S.C. § 4081. The second provision, 18 U.S.C. § 3621, provides in relevant part that the BOP:

> shall designate the place of the prisoner's imprisonment. The [BOP] may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the [BOP] ... that the [BOP] determines to be appropriate and suitable, considering--
>
> (1) the resources of the facility contemplated;
>
> (2) the nature and circumstances of the offense;
>
> (3) the history and characteristics of the prisoner;
>
> (4) any statement by the court that imposed the sentence--
>
> (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
>
> (B) recommending a type of penal or correctional facility as appropriate; and
>
> (5) any pertinent policy issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 U.S.C. § 3621(b).

These statutory provisions do not mandate a specific, non-discretionary course of conduct for the BOP to follow in classifying prisoners and placing them in a particular institution. Instead, they give the BOP ample room for judgment by listing a non-exhaustive set of factors for the BOP to consider and leaving to the BOP what weight to assign to any particular factor. In particular, the language granting the BOP authority to "designate any available penal or correctional facility ... that the [BOP] determines to be appropriate and suitable," 18 U.S.C. § 3621(b), is indicative of Congress' intent to allow the BOP to rely on its own judgment in classifying prisoners and placing them in institutions. Our conclusion that Congress intended to give the BOP discretion in making its classification decisions and determinations about

placement of prisoners is reinforced by the Senate Report accompanying the legislation that became 18 U.S.C. § 3621. That report provides in pertinent part:

> The Committee, by listing factors for the [BOP] to consider in determining the appropriateness or suitability of any available facility, does not intend to restrict or limit the [BOP] in the exercise of its existing discretion so long as the facility meets the minimum standards of health and habitability of the [BOP], but intends simply to set forth the appropriate factors that the [BOP] should consider in making the designations.

S.Rep. No. 98-225, 98th Cong., 2d Sess. 142, reprinted in 1984 U.S.Code Cong. & Admin. News 3182, 3325. Accordingly, the first part of the two-part discretionary function exception test, the element of judgment or choice prong, is satisfied in this case.

We turn now to the second prong, which requires that we determine whether the judgment or discretion the BOP exercises in this regard is the type of discretion which the discretionary function exception is intended to protect. More specifically, we must decide whether the nature of the decision or conduct at issue is "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325, 111 S.Ct. at 1275. As the Supreme Court noted in *Gaubert*, we presume that actions or decisions are "grounded in [public] policy" in cases where the statute allows government officials to exercise discretion. *Id.* at 324, 111 S.Ct. at 1274. Deciding how to classify prisoners and choosing the institution in which to place them are part and parcel of the inherently policy-laden endeavor of maintaining order and preserving security within our nation's prisons. See *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979) ("Prison administrators ... should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

This case exemplifies the type of case Congress must have had in mind when it enacted the discretionary function exception.

Under Cohen's theory, anytime a prisoner is injured by another prisoner, he can bring an action claiming that the BOP was negligent in classifying the prisoner who committed the assault and placing him in the institution at which the attack occurred, or in not removing that prisoner based upon some prior incident, or in not restricting his movement, or in not providing more guards, and so forth. Such second-guessing of the BOP's discretionary decisions is the type of thing avoided by the discretionary function exception, which is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1273 (internal citations and quotations omitted).

Accordingly, we conclude that the BOP's actions in classifying prisoners and placing them in institutions involve conduct or decisions that meet both prerequisites for application of the discretionary function exception.

C. Whether the Alleged Failure of the BOP to Follow Its Own Guidelines Concerning the Classification of Prisoners Renders the Discretionary Function Exception Inapplicable

Cohen argues that even if Congress gave the BOP discretion in classifying prisoners and placing them in institutions, the BOP constrained its discretion in this regard by promulgating internal guidelines set forth in Program Statement 5100.2 (the "Program Statement"). According to Cohen, because BOP personnel violated provisions of the Program Statement when they classified Garcia as suitable for the lowest security classification level and placed him at the minimum security Jesup institution, the discretionary function exception does not apply in this case. The district court found that the BOP failed to adhere to the Program Statement when its employees improperly filled out a "security designation form" as part of the process of determining Garcia's custody classification.

Where Congress has granted an agency discretion in

implementing a regulatory statute, the agency's promulgation of regulations or guidelines describing how it will use that discretion is protected by the discretionary function exception. See *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1274. Furthermore, if the regulation or guideline "mandates particular conduct, and the [agency's] employee obeys the direction, the Government will be protected [by the discretionary function exception] because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation [or guideline.]" *Id.* at 324, 111 S.Ct. at 1274. On the other hand, "[i]f the employee violates the mandatory regulation [or guideline], there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *Id.*

As we have discussed, Congress has given the BOP discretion in classifying prisoners and placing them in institutions. Accordingly, under *Gaubert*, the BOP's guidelines, as set forth in the Program Statement, and the actions of BOP personnel consistent with those guidelines are insulated by the discretionary function exception. The issue we must address is whether the district court correctly found that the BOP personnel failed to follow the guidelines in the Program Statement when they filled out Garcia's security designation form. We conclude that the district court clearly erred in reaching that conclusion.

The district court found that BOP personnel failed to follow the Program Statement guidelines in filling out Garcia's security designation form because they did not include Garcia's two prior felony convictions on that form. Garcia's two prior convictions, neither of which resulted in incarceration, were for (1) possession and sale of cocaine and (2) possession of cocaine, possession of a firearm, and resisting arrest without violence. Although the district court did not specify where on the security designation form those convictions should have been listed, Cohen contends BOP personnel were required to include them under either the "Prior Commitment" or "History of Violence" sections of the form. We disagree.

The Program Statement explicitly states that only

convictions which resulted in confinement should be included in the Prior Commitment section. Because Garcia's two prior convictions did not result in confinement, they were properly omitted from that section. As for the History of Violence section, nothing in the Program Statement requires including in that section convictions of possession and sale of cocaine, possession of a firearm, or resisting arrest without violence. Thus the district court clearly erred in finding that BOP personnel incorrectly filled out Garcia's security designation form. Accordingly, Cohen's argument, which the district court accepted, that the discretionary function exception does not apply because the BOP failed to follow its own guidelines is without merit.

Cohen also claims that the BOP failed to follow the Program Statement when it classified Garcia at the lowest security level, because the Program Statement did not allow aliens to be classified at that level. This argument fails both because the district court did not find that Garcia was an alien, and because the Program Statement provides that the BOP's regional director retains the discretion to assign an alien to the lowest security level.

D. Summary

To sum up, we hold that (1) the BOP's actions in classifying prisoners and placing them in institutions involve conduct or decisions that fall within the discretionary function exception; (2) 18 U.S.C. § 4042 does not render the discretionary function exception inapplicable to cases, such as this one, in which a prisoner attacks another prisoner; and (3) because BOP personnel followed the guidelines in the Program Statement when they classified Garcia and placed him in the minimum security Jesup institution, those guidelines do not render the discretionary function exception inapplicable. Accordingly, that exception shields the United States from liability to Cohen under the FTCA, and the district court should have dismissed Cohen's FTCA claim for lack of subject matter jurisdiction. In light of our holding that Cohen's FTCA claim should have been dismissed, the Government's argument that it was not negligent and Cohen's cross-appeal

claiming he was entitled to increased damages are moot.

IV. CONCLUSION

The district court's judgment is REVERSED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8737

District Court No. CV294-179

WILLIAM COHEN,

Plaintiff-Appellee,
Cross-Appellant

versus

UNITED STATES OF AMERICA,

Defendant-Appellant,
Cross-Appellee

Appeals from the United States District Court
for the Southern District of Georgia

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and were argued by counsel;

UPON CONSDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby REVERSED;

It is further ordered that each party bear their own costs on appeal.

Entered: August 26, 1998
For the Court: Thomas K. Kahn, Clerk
By: /s/ Matt Davidson
Deputy Clerk

REISSUED AS MANDATE: NOV 30 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-8737

WILLIAM COHEN,

Plaintiff-Appellee,
Cross-Appellant

versus

UNITED STATES OF AMERICA,

Defendant-Appellant,
Cross-Appellee

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F2d ___)

Before: CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:
The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. O. Carnes
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 20 1998
THOMAS K. KAHN
CLERK

ORD-42
(6/95)

Full Text of Constitutional Provisions and Statutes Involved in the Present Case

Constitutional Provisions:

U. S. Constitution, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes:
(in numerical order by Title and Section)

18 USC §3521:

> (a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the

participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

18 USC §3621(b):

(a) The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 USC §4041:

The Bureau of Prisons shall be in charge of a director appointed by and serving directly under the Attorney General at a salary of $10,000 a year. The Attorney General may appoint such additional officers and employees as he deems necessary.

18 USC §4042(2):

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> > (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
> >
> > (3) . . .

18 USC §4081:

> The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

28 USC §501:

> The Department of Justice is an executive department of the United States at the seat of Government.

28 USC §503:

> The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.

28 USC §1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 USC §1346(b)(1):

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC §2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity,

temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 USC §2672:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal

agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 USC §2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 USC §2679(a):

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b)

of this title, and the remedies provided by this title in such cases shall be exclusive.

28 USC §2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

42 USC §1997e(a):

(a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Kansas Stat. Ann. 75-6104(e):

A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . .

(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved; . . .

[GOVERNMENT TRIAL EXHIBIT 4] Non-Guideline [_]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.) Docket No. 90-58-Cr-KING

Humberto Garcia) Defendant No 1

PRESENTENCE REPORT

Prepared for:
Honorable James Lawrence King
U.S. District Judge

Sentencing Date:
November 2, 1990

Prepared by:
Suzanne Ferreira-adm
U.S. Probation Officer

Office Location:
Miami, FL

Offense: Count 1: Possession With Intent To Distribute At Least 500 Grams Of Cocaine, Title 21, USC, Section 841(a)(1) and Title 18, USC, Section 2.

Penalty: 5 to 40 years BOP, 4 years supervised release, $2,000,000 fine and $50 assessment.

Date of Arrest: 1-17-90

Custodial Status: Released on $50,000 Corporate Surety Bond $100,000 Personal Surety Bond on 1-23-90.

Identifying Data

Date of Birth: Age: 32 Citizenship:

10-2-58		Cuban
Race: White	Sex: Male	Marital Status: Single
FBI No.: 168761T5	SSN: 265-37-8214	Dependents: 0
Education: 10th Grade	Marshal No.: 41734-004	Other ID No.: Alien #11643153

Legal Address: 9722 S.W. 142nd Place
Miami, FL 33187

Detainers: None

Codefendants: None

Assistant U. S. Attorney	Defense Counsel
Ray Pierson	Joel DeFabio
155 South Miami Avenue Miami, FL (305) 536-5450	2121 Ponce De Leon Blvd Suite 430 Coral Gables, FL 33134 (305) 448-7200

Date report prepared: 10-4-90

Revised:

Mandatory Minimum [_]

PART A. THE OFFENSE

Charges and Convictions

1. On August 14, 1990, Humberto Garcia pled guilty to a one count indictment charging him with Possession With Intent To Distribute At Least 500 Grams Of Cocaine, in violation of Title 21, USC, Section 841(a)(1) and Title 18, USC, Section 2. Sentencing has been scheduled for November 2, 1990 at 9:00 a.m.

Related Cases

2. None

The Offense Conduct

3. Beginning in October, 1989, until January, 1990, Special Agent Forteza with the Drug Enforcement Administration (DEA) had several meetings and telephone conversations with Humberto Garcia to discuss the purchase of between 15 and 20 kilograms of cocaine. S/A Forteza was introduced to Garcia through a confidential informant (CI). During a meeting on November 16, 1989, S/A Forteza advised Garcia that he was interested in purchasing approximately 20 kilograms of cocaine. Garcia responded that he could provide the cocaine, however, he would deliver between three and five kilograms as a sample in the initial transaction. He agreed to provide additional quantities of cocaine subsequent to the initial transaction.

4. On January 17, 1990, the CI contacted S/A Forteza and advised that he had made arrangements to meet with Garcia for the delivery of three kilograms of cocaine. A meeting was arranged at a DEA undercover office for later that day. At approximately 7:30 p.m., Forteza met with Garcia and the CI at the undercover office at which time Garcia delivered three kilograms of cocaine. Upon receiving the cocaine, S/A Forteza placed the defendant under arrest.

5. Laboratory analysis of the cocaine revealed a net weight of 3007 grams of cocaine with 92% purity which results in a total net weight of 2,766 grams of 100% pure cocaine.

Adjustment For Obstruction Of Justice

6. The defendant was released on bond on January 23, 1990. On June 21, 1990, the U.S Attorney's office filed a motion to revoke the defendant's bond based on allegations of threats to the confidential informant. According to the government's motion, prior to the defendant's case going to trial, he had contacted the CI through close friends and

associates. According to the government's motion, the CI received threats over the telephone as well as in a face to face confrontation with an associate of the defendant's. During the face to face confrontation, the CI was informed by the defendant's associate that the defendant was angry and would take action against the CI. The associate cautioned the CI to be careful since the defendant is a dangerous guy.

7 This motion was brought before Magistrate Palermo who denied the 'notion based on insufficient evidence that the defendant instigated the threats.

8 Section 3C1.1 of the sentencing guidelines provides for an enhancement were the defendant willfully impedes or obstructs the administration of justice. One of the examples provided in the application notes is threatening or intimidating a witness. It would appear that the allegations made by the government would in fact constitute an obstruction of justice. However, this matter was brought before Magistrate Palermo and he entered a ruling that insufficient evidence existed to determine that the defendant was the instigator of the threats. Therefore, an enhancement for obstruction of justice would not be appropriate in this case.

Adjustment For Acceptance Of Responsibility

9. Subsequent to his arrest, the defendant made no statements to the authorities acknowledging involvement in any criminal offense. However, subsequent to his plea of guilty, he provided a statement to the U.S Probation Office outlining his involvement in this offense and acknowledging personal responsibility for his criminal conduct.

Offense Level Computation

10. Base Offense Level: The guideline for a Title 21, USC, Section 841 is found in Section 2D1.1 of the sentencing guidelines. This section provides that offenses involving three kilograms of cocaine have a base offense level of 28. Pursuant to 1B1.3 relevant conduct, the court could consider the total amount of cocaine negotiated by the defendant which amounted to between 15 and 20 kilograms. However, the government has no evidence or reliable information that the defendant had the ability to produce the amount of cocaine for which they were negotiating. Therefore, the guidelines have been calculated using the quantity of cocaine that the defendant actually produced.
28

11. Specific Offense Characteristics: None 0

12. Adjustment For Role In The Offense: None 0

13. Victim Related Adjustment: None 0

14. Adjustment For Obstruction Of Justice: None 0

15. Adjusted Offense Level (Subtotal): 28

16. Adjustment For Acceptance Of Responsibility: The defendant has admitted his involvement in the offense and has demonstrated personal acceptance of responsibility for his criminal conduct. Based on 3E1.1(a), the offense level is reduced two levels. -2

17. TOTAL OFFENSE LEVEL: 26

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

18. None

Criminal Convictions

	Date of Arrest	Charge/Agency	Date Sentence Imposed/ Disposition	Guideline/ Score
19.	1-12-79 (age 20)	Ct. 1: Possession of Cocaine Ct. 2; Sale Of Cocaine Ct. 3: Conspiracy To Commit A Felony North Miami Police Dept.	9-27-79: (Case #79-1004A) Adjudication withheld, 1 year probation with $500 fine.	4A1.2(e) (2)

Codefendant Margarita Aragunde met with an undercover police officer in her vehicle to discuss the purchase of two ounces of cocaine for $2,800. Shortly thereafter, Humberto Garcia appeared and gave the codefendant one ounce of cocaine which she then sold to the undercover officer for $1,400. The defendant was represented by counsel.

20.	7-26-83 (age 24)	Case #83-1737 Ct. 1: Carrying A Concealed Firearm	4A1.1c Adjudicated guilty on Cts. 1 & 4, 18 months

probation.

Ct. 2:	
Possession Of Cocaine	Probation terminated on 11-4-85
Ct. 3:	
Carrying A Concealed Firearm	
Ct. 4:	
Resisting Arrest Without Violence, Metro Dade PD, Miami, FL	

On July 26, 1983, the defendant was observed at the Mayfair Shopping Center in Coconut Grove, Florida, carrying a handbag which appeared to contain a large weapon. He attempted to enter a nightclub at which time a club employee observed the bag and asked the defendant if it contained a gun. The defendant responded affirmatively and a uniformed police officer at the scene overheard the conversation. The defendant was placed under arrest and subsequent to a search a small quantity of cocaine was found on his person. Subsequent to his arrest, the defendant made threats to the nightclub employee in front of the uniformed police officer. He stated that he intended to cause him physical harm and that he would hire a hit man from Colombia to kill him.

Garcia was represented by defense counsel P. Nalley. On May 4, 1984, he was placed on 18 months probation. On August 2, 1984, an affidavit for violation of probation was filed with the court alleging that the defendant had violated probation by committing a new offense of attempted murder and possession of a controlled substance on July 1, 1984. The affidavit and probation violation were subsequently dismissed on December 5, 1984. Probation terminated on November 4, 1985.

Criminal History Computation

21. The defendant has one prior criminal convictions with a total of one criminal history point. This results in a criminal history category of I.

Other Criminal Conduct

	Date of Arrest	Charge/Agency	Date Sentence Imposed/ Disposition
22.	1-25-78 (age 19)	Ct. 1: Burglary Ct. 2: Loitering and Prowling, Metro Dade, PD Miami, FL	Dismissed
23.	2-6-78 (age 19)	Ct. 1: Carrying A Concealed Firearm Ct. 2: Dealing In Stolen Property Ct. 3: Obstruction Of Justice, Metro Dade PD, Miami, FL	Dismissed
24.	11-17-78 (age 20)	Ct. I: Possession Of Quaaludes, Miami Police PD, Miami, FL	Dismissed
25.	4-29-79 (age 20)	Ct. 1: Aggravated	No Information filed

		Assault On A Police Officer Ct. 2: Disorderly Conduct Ct. 3: Resisting An Officer Without Violence, Metro Dade PD, Miami, FL	
26.	3-22-80 (age 21)	Carrying A Concealed Firearm, Metro Dade PD, Miami, FL	No Information Filed
27.	1-26-83 (age 24)	Aggravated Assault, Metro Dade PD, Miami, Fl	Nolle Prossed
28.	10-1-83 Dismissed (age 25)	Obstruction By False Information, Metro Dade PD, Miami, FL	
29.	10-20-83 (age 25)	Ct. 1: Possession Of Machine Gun Ct. 2: Grand Larceny Ct. 3: Possession Of Firearm With Altered Serial Number	Nolle Prossed

Ct. 4:
Trafficking
In Cocaine
(73 grams)

Ct. 5:
Possession Of
Marijuana Over
30 Grams

Ct. 6:
Possession Of
Narcotic Equipment

Ct. 7:
Carrying Concealed
Firearm

Ct. 8:
Resisting Arrest
Without Violence

Probation

38. Statutory Provisions: The defendant is not eligible for probation as the offense of conviction is a Class "B" Felony, pursuant to Title 18, USC, Section 3561(a)(1).

39. Guideline Provisions: Probation is not authorized by the guidelines, as the offense of conviction is a Class "B" Felony, pursuant to 5B1.1(b)(1).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities and Community Ties

40. Humberto Garcia was born in Havana, Cuba on October 2, 1958. He is the second of three children born to Sarah Garcia. According to the defendant, his father, Humberto Garcia, was a Mexican citizen who was not married to his

mother. He has no other information concerning his father nor has he had any relationship with him. Since the age of~10, Garcia lived with his maternal grandfather, Luis Manuel Garcia. In 1960, Garcia immigrated to the United States with his godfather, Carlos Martinez. His mother and sisters immigrated approximately one year later. The family established a residence in Miami and Sarah Garcia supported her children through her work as a beautician. The defendant has two half sisters, Alicia Garcia and Lilyana Traub, both of whom reside in Miami, Florida. According to the defendant, he does not have a close relationship with his family and has not had much contact with them in the previous year. Garcia has resided in Miami, Florida since 1960. He is a resident alien known to INS under alien #A11643153.

41. Contact was made with the defendant's sister, Lilyana Traub. After advising her of the purpose of the inquiry by the U.S. Probation Office, it became clear that Ms. Traub intended to use her cooperation with the U.S. Probation Office as some form of inducement for the defendant to comply with her wishes. She provided no information concerning the defendant's family background and would only remark that she had not spoken with her brother since he came to her house and physically assaulted her a few months ago. She would provide no information concerning the defendant's mother or how she could be contacted. The Probation Officer was unable to get additional information concerning immediate family members in order to verify the defendant's family history.

42. Although Humberto Garcia is single and has never married, for the previous six years he had been involved in a relationship with Mercedes Diez, age 28. She and the defendant are cohabiting and their residence is located at 9722 S.W. 142nd Place. This is a three bedroom townhouse located in the Southwest Section of Dade County. According to Ms. Diez as well as Dade County Property Records, the residence was purchased by Ms. Diez in May of 1990 for approximately $95,000. The

home was purchased in Diez's name and the defendant has no financial interest in the residence. Also living at the residence is Ms. Diez' eight year old son, Anthony Diez. According to the defendant and Ms. Diez, they share a close relationship, but have no plans for marriage.

Mental And Emotional

43. Garcia denies any history of mental or emotional disorders. During the course of the interview, he was coherent, articulate and exhibited no signs of such disorders. He is bilingual, fluent in English and Spanish.

Physical Condition, Including Drug Dependence and Alcohol Abuse

44. Humberto Garcia is a white male who stands 5'6" tall, weighs 165 pounds with brown hair and brown eyes. He is reportedly in good health and has never suffered from any serious illnesses. He denies the use of any drugs or narcotics and denies any alcohol consumption. According to the defendant, he does not smoke cigarettes, consume caffeinated beverages or sugar.

Education And Vocational Skills

45. Garcia attended South Miami Senior High School, but withdrew during the 10th grade. His school transcripts from 1975 indicate the defendant was earning a "D" average prior to his withdrawal. He has had no further education or vocational training.

Employment

46. Since 1986, the defendant, in partnership with Mercedes Diez, has operated a business known as Honey Bee's Florist Inc. The business is located at 7273 N.W. 36th Street in Miami, Florida. This is a retail flowershop which provides flower arrangements for individuals as well as

commercial accounts. According to the defendant, he derives an income of approximately $300 per week as a result of this business. Honey Bee's Florist was incorporated in the State of Florida on April 16, 1986 under document #M30563. According to the defendant and Ms. Diez, no tax returns have been filed for the corporation since 1986. A visit was made to the flower shop which appears. to be a small commercial florist shop operated by the defendant and Ms. Diez exclusively. During the visit to the employment site, Ms. Diez was present and engaged in some commercial transactions with various individuals. She had just received a shipment of flowers which the defendant had been in the process of cleaning and sorting. According to Ms. Diez, the business has been suffering financially since December, 1989 when a motor vehicle collided with the front entrance of the shopw The vehicle drove through the glass door and window to the shop causing approximately $15,000 worth of damage to merchandise and to the premises. According to Ms. Diez, they received an insurance settlement of only $4,000.

47. From 1984 through 1985, Garcia was reportedly been employed with various men's clothing stores including Luciano's and Alexandro's. According to the defendant, he was employed as a commissioned sales person and averaged between $300 and $500 per week. Attempts to verify employment with these two companies met with negative results. It appears that both companies may now be out of business.

48. From 1983 until 1984, Garcia was reportedly employed with Lansons Men Clothing Store at the Omni International Mall. He reportedly worked on a full-time basis as a salesman, averaging $500 per week in commissions. Contact was made with the payroll manager for Lansons and their records reflect the defendant was employed from November 29, 1984 until February 9, 1985 as a commissioned salesman.

49. Prior to 1983, Garcia stated he was employed doing various jobs including waiting tables at restaurants, teaching martial arts and working at health clubs. He was unable to recall all of the various places he worked and the time sequence of his various employments.

PART E. FINES AND RESTITUTION

Statutory Provisions

50. The maximum fine for this offense is $2,000,000, pursuant to Title 21, USC, Section 846.

51. A special assessment fee of $50 is mandatory under Title .18, USC, Section 3013.

Guideline Provisions

52. The fine range for this offense is from $12,500, 5E1.2(c)(l)(A) and $2,000,000, 5E1.2(c)(4)(A).

53. Subject to the defendant's ability to pay, the Court shall impose an additional monetary amount that is at least sufficient to pay the costs to the Government for any imprisonment, probation, supervised release or community confinement, Section 5E4.2(i). The most recent advisory from the Administrative Office of the U.S. Courts dated May 11, 1989, suggests that a monthly cost of $1,210.05 be used for imprisonment, a monthly cost of $91.66 be used for supervision and a monthly cost of $938.44 be used for community confinement.

Defendant's Ability To Pay

ASSETS

Cash	$ 0
Unencumbered Assets	

1985 Chevrolet Van	$4,000
Equity in Other Assets	
*1990 Jeep Cherokee	$1,000
TOTAL ASSETS	$5,000
Unsecured Debts	
Credit Cards	$3,695
TOTAL UNSECURED DEBTS	$3,595
NET WORTH	$1,305

*Seized By The D.E.A.

MONTHLY CASH FLOW	
Net Salary	$1,200
TOTAL INCOME	$1,200
NECESSARY LIVING EXPENSES	
Mortgage	$400
Electric	$ 75
Telephone	$ 30
Groceries/Supplies	$150
Clothing	$100
Installment Payments	$155
Gas	
TOTAL NECESSARY EXPENSES	$910
NET MONTHLY CASH FLOW	$290

Analysis

54. The defendant reports only two assets, one of which is a 1985 Chevrolet an valued at $4,000. This van is used for transportation and deliveries for Honey Bee's Florist. In January, 1990, Garcia purchased a Jeep Cherokee for approximately $25,000. According to the installment contract, Garcia made a $6,000 cash down payment and financed the balance which resulted in a $500 per month car payment. At the time of his arrest, the DEA seized the jeep and it now the subject of forfeiture proceedings. According to the defendant, he only made a $1,000 cash down payment on the vehicle and has approximately $1,000 in equity. Although he holds half interest in Honeybee's Inc., this company has no significant liquid assets and many outstanding debts. Further information concerning the company's financial status is unavailable since no tax returns have been filed since its inception. He reports no other significant assets. He shares monthly expenses with his girlfriend, Mercedes Diez. The residence in which they live is owned exclusively by Ms. Diez. Based on the defendant's current financial profile, it appears that he is unable to pay a fine.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

55. There are no aggravating or mitigating circumstances concerning the offense or the defendant that would warrant a departure from the prescribed guideline range.

PART G. IMPACT OF THE PLEA AGREEMENT

56. The defendant pled guilty to a one count indictment and there is no plea agreement in this case.

/s/ Suzanne Ferreira
Suzanne Ferreira
U.S. Probation Officer

Reviewed and Approved:
/s/ [illegible] Carroll
[illegible] Carroll
U.S. Probation Officer

Humberto Garcia Docket No. 90-58-Cr-KING

ADDENDUM TO THE PRESENTENCE REPORT

This probation officer certifies that the presentence report has been made available to the defendant, his attorney, and to counsel for the government.

OBJECTIONS

By the Government

The Government has reported no objections pursuant to Administrative Order 90-26.

By the Defendant

The defendant, through defense counsel makes one objection to the presentence investigation. The defense counsel points out that Paragraph 54, page 14 of the presentence investigation states the defendant purchased a vehicle in 1990 with a $6,000 cash down payment as reflected on a copy of an installment contract for the purchase.

According to the defendant, he made a $1,000 cash down payment. The balance of the down payment indicated on the installment contract consisted of factory rebates and allowances for a vehicle trade in.

Probation Officer's Response

The Probation Office has no objection to this additional information being included in the presentence investigation and will be made a part thereto by way of this addendum. There are no additional disputes with the presentence investigation.